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PART V.

ENGLISH LAW OF REAL PROPERTY AND LAW OF INTESTATE AND TESTAMENTARY SUCCESSION.

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Selection of Leading Cases.

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ENGLISH LAW OF REAL PROPERTY AND LAW OF INTESTATE AND TESTAMENTARY SUCCESSION.

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PART V.

FOR THE USE OF B. L. STUDENTS.

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SELECTION OF LEADING CASES

V.

ENGLISH LAW OF REAL PROPERTY

AND THE

Law of Intestate and Testamentary Succession.

MORLEY *v.* BIRD.

[*Reported in 3 Ves. 629 ; 4 R. R. 106.*]

1798.
March, 1.

William Collins by his will gave to his daughter Elizabeth all his free-hold houses and land at Newbury and Bath and Weston, with all his money in the stocks, mortgages, debts &c. goods, chattels, "and every thing I die possessed of, I give this all to her only use and pleasure forever, on condition that she do pay to the four daughters of my brother John Collins four hundred pounds out of seven now lying in the 3 *per cent.* consolidated."

Three of the four daughters of John Collins died in the life of the testator. The surviving daughter Martha in 1790, married Thomas Morley. The testator died on the 1st of June 1793. The bill was filed in June 1797 by Morley and his wife against William Bird and Elizabeth his wife, the testator's daughter, claiming the whole legacy given to the four daughters of John Collins.

The defendants by their answer stated, that the defendant Elizabeth having been advised, that the plaintiff Martha was only entitled to £100 of the said £700, 3 *per cent.* annuities, the defendant Elizabeth from time to time caused to be transferred £600 of such annuities; leaving £100 to answer the plaintiff's legacy, and which the defendant offered to transfer, and to permit the plaintiffs to receive the dividends accrued subsequent to the testator's death.

Master of the rolls.—The only point is, whether this legacy is to be considered as a joint legacy, given to the four daughters of Collins as joint tenants, or whether they were to take £100 each as tenants in common. The first question is, whether the form in which this legacy is given makes any difference from what would be the case, if it was a direct legacy to be paid by the executor. That was contended to take it out of the common case; supposing a joint legacy can take

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v.
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place; that not being a legacy to be paid by the executor, but payable upon a condition, if it is not to be done according to the terms, it is void; and if so, three being dead, and the condition therefore having become impossible, it proves totally void; and would absolve the devisee from the payment of any sum. It is impossible to make the least distinction between a legacy to one person upon condition to pay to four persons £400 and a legacy of £400 to be paid to them by the executor.

The next question is, whether, according to the rules of this Court, a legacy of a gross sum given to two or more without any words of severance or distribution, is a gift in joint-tenancy to the persons intended to be benefited. That came before me in *Campbell* v. *Campbell* (1), where the first question was, whether there were sufficient words of severance to make a legacy a tenancy in common; supposing there could in point of the rules of construction be any such thing as a joint legacy; and I was pressed with *Perkins* v. *Baynton* (2); in which it was said Lord Thurlow had expressed a doubt, whether a legacy is a subject upon which a joint-tenancy can attach. I remember taking much time, and fully inquiring, whether there was any foundation for that doubt; and the result of that inquiry led me to think the report of *Perkins* v. *Baynton* (2) must have been mistaken; and I took notice that it was not the point before Lord Thurlow; for the question there was merely, whether there was a severance or not. As the opinions of great Judges given upon points not before them, have certainly not so much weight, as when the points are before them, I should on that account have paid the less regard to it: but if I was satisfied that Lord Thurlow really doubted the point, even though it was not before him, I should have much questioned my own opinion: but I rested my opinion in *Campbell* v. *Campbell* (1) upon *Cray* v. *Willis* (3), which I still conceive a direct authority by a very great Judge, Sir Joseph Jekyll, upon all questions of this nature. He seems to consider, that both residuary and pecuniary legatees must be taken to be joint-tenants, unless there are words of severance shewing an intention to make a tenancy in common; and I cannot suppose Lord Thurlow threw out that doubt: but I am relieved from difficulty by subsequent cases before Lord Thurlow in which he makes no such doubt. In *Jolliffe* v. *East* (4),

(1) 4 Bro. C. C., 15.
(2) 1 Bro. C. C., 118.
(3) 2 P. Wms., 529.
(4) 3 Bro. C. C., 25.

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Morley
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he throws out no such doubt: on the contrary, he expressly gives his opinion there, that it is a joint-tenancy or a tenancy in common, according as there are words of severance or not. The pains, he there takes, would have been thrown away if he had any such doubt. He had the question before him, whether the legacy of of £10,000 was a joint-tenancy or a tenancy in common; and there is not the least hint of his having doubted, whether the subject was capable of a joint-tenancy; and therefore I believe he never entertained such a doubt.

Then the question is, whether, if the manner in which this legacy is given, makes no difference, which it is impossible to suppose, this legacy without any words, which can in any degree be construed a severance, is not a joint interest, and the consequence is, that it is a gift to all of them to the survivor, as at law; and the deaths of the three will not vitiate the gift.

I wish to give my opinion very explicitly. Great doubts have been entertained by Judges both at Law and in Equity as to words creating a joint-tenancy or a tenancy in common; and it is clear, the ancient law was in favour of a joint-tenancy; and that law still prevails: unless there are some words to sever the interest taken, it is at this moment a joint-tenancy, notwithstanding the leaning of the Courts lately in favour of a tenancy in common. A legacy of a specific chattel, a grant of an estate, is a joint-tenancy. It is true, the Courts seeing the inconvenience of that, have been desirous, wherever they could find any intention of severance, to avail themselves of it; and their successive determinations have laid hold of any words for that purpose. "Equally to be divided, [*Rigden* v. *Vallier* (1)] equally, among, between," even in law I believe, certainly in Equity, create a tenancy in common: but without those words it is a joint-tenancy. But many distinctions have been raised in Equity, as where persons are in trade, and have joint debts due to them; the Courts say, it could not be intended to the prejudice of the family of the deceased partner; therefore, not doubting, that it would be a joint-tenancy at Law, in Equity they say, it could not be the agreement. So if two people join in lending money upon a mortgage, Equity says, it could not be the intention that the interest in that should survive. Though they take a joint security, each means to lend his own and take back his own. But that was never extended to grants. A voluntary bond would survive, if no intention of the party to make a severance appears. Therefore legacies, gifts, grants, &c., are both at Law and in Equity joint;

(1) 1 Ves. Pen 252.

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except from the nature of the contract, or from the words, some intention of severance appears.

This is a legacy to four persons; and there are no words of severance; therefore it is a joint legacy; and the whole interest survives to the survivor, three being dead; and though I agree with those who think it the least evil that it should be a tenancy in common, this is one of those cases in which it is more convenient that it should remain joint. Sir Joseph Jekyll in *Cray* v. *Willis* (1,) observes the convenience that a joint-tenancy sometimes has; that the legacy is not lost. This legacy therefore belongs to the plaintiffs. (See *Stuart* v. *Bruce*, 3 Ves. 632).

It was then contended that this was a specific legacy; and the plaintiffs were entitled to the value of the £300 stock at the end of a year from the testator's death.

The Master of the Rolls was of opinion, upon reading the will, that it was specific; observing, that on that account it was more clearly a joint-tenancy; and upon the 8th of March declared as to the £300 that the plaintiffs were entitled according to the value of the stock at the end of a year from the death of the testator, when it ought to have been transferred; and directed an inquiry to ascertain the value at that time; and that the remaining £100 should be transferred with the dividends accrued.

NOTE.

This case lays down the rule that notwithstanding the leaning of Courts in favour of a tenancy in common, an interest given to two or more either by way of legacy or otherwise is joint, unless there are words of severance as 'equally,' 'among', or an inference of that sort arises in equity from the nature of the transaction; as in a partnership or a joint mortgage &c. Thus where money is advanced by persons, either in equal or unequal shares who take a mortgage to themselves jointly, equity will treat this as a tenancy in common, the survivor being a trustee for the personal representatives of the deceased mortgagee. It has been observed that although the ground for this distinction between purchases and mortgages is not particularly clear, it is well settled; see *Robinson* v. *Preston*, 4 Kay & Johnson 511; *Steers* v. *Steers*, 22 Q. B.D. 537, in which latter case it was observed that where a mortgage debt has been paid to one of the mortgagees, the land is not discharged and the concurrence of the other mortgagee is necessary to make a good title. See also Sec. 61 of the Conveyancing and Law of Property Act, 1881. Reference may be made to *Lake* v. *Craddock*, 2 Wh. & T.L.C. 972, which applies a similar principle to cases of joint purchase for the purposes of a joint undertaking or partnership either in trade or any other dealing.

The leading case further decides that a specific legacy of stock should be decreed according to the value at the time it ought to have been transferred.

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(1) 2 P. Wms., 529.

IN RE ROSHER.

ROSHER *v.* ROSHER.

[1882 R. 1829.]

[*Reported in 26 Ch. D. 801.*]

1884.
May, 28.

J. B. Rosher, by his will, dated the 26th of November, 1872, devised as follows :—

"I devise all my manor, commonly called *Trewyn Manor*, and all other my real estate, unto my said son Jeremiah Lilburn Rosher, his heirs, executors, administrators, and assigns, according to the tenure thereof respectively. Provided always, and I hereby declare that if my said son, or his heirs or devisees, or any person claiming through or under him or them, shall desire to sell my manor and estate of *Trewyn*, and other my estates in the counties of Monmouth and Hereford, or any part or parts thereof, in the life time of my wife, she shall have the option to purchase the same at the price of £3000 for the whole, and at a proportionate price for any part or parts thereof, and the same shall accordingly be first offered to her at such price or proportionate price or prices. And I also declare that if my said son, his heirs, or devisees, or any person claiming through or under him or them, shall during the life of my said wife desire to let *Trewyn House*, garden, buildings, land and premises, or any part or parts thereof, now in my occupation, for a longer period than three years at any one time, she shall have the option of renting the whole of the lastly described premises for any period exceeding three years as she shall desire, at the yearly rent of £25, and the same shall be first offered to her accordingly : and that if my said son, his heirs or devisees, or any person claiming through or under him or them, shall during the life of my said wife desire to let *Lower Trewyn*, or any part or parts thereof, for a longer period than seven years at any one time. She shall have the option of renting the whole of the said *Lower Trewyn* for any period exceeding seven years as she shall desire, at the yearly rent of £35, and the same shall be first offered to her accordingly."

The testator died on the 26th of November 1874. This action was brought by the widow against the son. The special case was stated by consent for the opinion of the Court, pursuant to Order xxxiv. of the Rules of Court of 1875.

The case stated that the real selling value of the manor and estate of Trewyn, and other the estates of the testator in the

1884.

In re Rosher. Rosher v. Rosher.

counties of Monmouth and Hereford, was, at the date of the will and at the time of the testator's death, £15,000 and upwards; that the real letting value of Trewyn House, garden, buildings, land, and premises, was, at the date of the will and at the time of the testator's death, £100 and upwards per annum; and that the real letting value of Lower Trewyn was at the date of the will and at the time of the testator's death £100 and upwards per annum.

The questions for the opinion of the Court were:—

(1) Whether or not, according to the true construction of the will, the son was entitled to sell or to mortgage or charge respectively the estates devised to him by the will, or any part thereof, without first offering to the widow the option to purchase the premises so intended to be sold or to be mortgaged or charged at the price named in the will, or at a proportionate price, according to the quantity dealt with, as the case might be, or whether the provisions and directions contained in the will in reference to the option of purchase were null and void?

(2) Whether or not, according to the true construction of the will, the son was entitled to let the premises called Trewyn House, or any part thereof, for a longer term than three years, or the premises called Lower Trewyn, or any part thereof for a longer period than seven years, without first offering to the widow the option of renting the same respectively as directed by the will at the respective rents named therein, or whether the provisions and directions in the will contained in reference to the letting of the said premises or either of them were void and of no effect?

Pearson, J., after stating the facts, continued:—

The question I have to decide is whether, there being an absolute devise in fee simple to the son, the conditions annexed to it are valid. I will deal first with the condition which relates to selling and it will, I hope, shorten the observations which I have to make if I first state the manner in which I interpret this condition.

The restriction upon selling is this, that if the son, or any person claiming through or under him is minded to sell during the life time of the testator's widow, the estate intended to be sold, whether it is the whole or only part of the devised estates, must be offered to the widow at the price of £3000 for the whole, or at a proportionate price for a part. It is agreed that the value of the whole estate at the death of the testator was £15,000. It is, therefore, in effect a condition that if the son desires to sell, he shall offer the estates to the widow, and that

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she is to be at liberty to buy them at one-fifth of their value. I consider that (and I mean to decide the case upon that conclusion) as an absolute restraint against sale during the life of the widow. I mean to treat it as if it had been, "during the life of the widow you shall not sell," because to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is, to my mind, equivalent to a restraint upon selling at all. And I think there is authority for that conclusion, for in *Bragg* and *Tanner's Case* (19 Jac. 1) (1) it was held by Justices Dodridge and Chamberlain, that if a feoffment be on condition that if the feoffee alien he shall pay £10 to the feoffor, this is a good condition ; but the Chief Justice and Haughton, *J.*, held the contrary, for then this shall be a circumvention of the law. And in *Billing* v. *Welch* (2) that case is thus referred to in the judgment of the Court of Queen's Bench, delivered by Mr. Justice O'Brien (3). "The author (Sheppard) then refers to a case in which Dodridge and Chamberlain, JJ., held, that if a feoffment be on condition that if the feoffee alien he shall pay £10 to the feoffor, the condition would be good ; but in which case the Chief Justice and Haughton J., held the contrary, on the ground that this would be a "circumvention of the law". In our opinion, the ruling of the Chief Justice and Haughton, J., was the correct one. If a covenant be held good which, in the event of a grantee in fee simple aliening the land, merely imposes a fine upon him (or an additional rent on the lands, as in the case before us) the general rule might be evaded and the principles of it violated by fixing such an amount of fine or additional rent as would effectually prohibit the alienation, which would clearly be a 'circumvention of the law'." To my mind, to compel the son in the present case, if he chose to sell, to sell at one-fifth of the value of the estate, is really a prohibition of alienation during the widow's life time. The question, then, which I have to determine is this, is it or is it not the law that to a devise in fee simple you may annex a condition that during a limited period the devisee shall not sell at all ?

Now, in order to determine this question we must go back to that which is to a great extent the fountain-head of the English

(1) Sheppard's Touchstone, 7th Ed. Vol. i. 130.
(2) I. R. 6 C. L. 88.
(3) I. R. 6 C. L. 101.

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In re Rosher. Rosher v. Rosher.

Law, I mean Coke upon Littleton. There it is said [Co. Litt (1)], "Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void ; because when a man is enfeoffed of lands or tenements (*pur ceo que quant home est enfeoffe de terres ou tenements*) he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason ; and therefore such a condition is void". And Mr. Charles Butler, in a note to Sec. 362, says : " A power of suffering a common recovery, and of levying a fine within the statutes of 4 Hen. 7, and 32 Hen. 8, is so inseparably inherent to the estate of a tenant-in-tail, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void. But it does not vitiate the grant of the estate tail to which it is annexed ; because (to use an expression of Lord Hobart) a condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant preceding it, neither in anything expressed, nor in anything implied, which is, of its nature, incident to and inseparable from the thing granted. I conceive, therefore, that Mr. Charles Butler, on the same ground, must have said that the power of sale is a thing incident to and inseparable from an estate in fee simple, and that a condition against selling annexed to such an estate is absolutely void. But I think Lord Coke's observations in *Mary Portington's Case* (2) make the matter still plainer. He says : "And it was well observed in this case. That to an estate tail there are three manner of incidents ; some by the common law, others by Act of Parliament, and some by custom. By the common law such as are not restrained by the statute and cannot be restrained by any condition, as dower and tenancy by the courtesy after issue, are incident to an estate tail, and cannot be restrained by condition. Also the estate of him, and of tenant in tail after possibility, are dispunishable of waste, so a collateral warranty is a bar to an estate tail, and a common recovery also, and none of these can be restrained by any condition or limitation. By statute law, as to make leases by the statute of 32 Hen 8, c 28, and to levy a fine by the statute of 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, to bar issues, and none of these which are incidents to his estate by Act of Parliament may be restrained

(1) Sec. 360.

(2) 10 Rep. 35 a, 38 b.

by condition: for when a man makes a gift in tail, he *tacite* gives these incidents to it; and therefore to restrain them by condition or limitation would be repugnant. For suppose that a man makes a gift in tail, and further grants that he may make leases for years or lives according to the said Act; or to levy a fine with proclamations according to the Acts in such case to bar his issues; provided always that he shall not make leases or levy a fine; none will deny but such proviso would be repugnant; and by consequence in the other case, when such incidents are tacitly implied; for *expressio eorum quæ tacite insunt nihil operatur*". And so in the case of a devise in fee simple, if I may translate it adapting this illustration of Lord Cokes, "I devise *Black Acre* to A and his heirs, in fee simple, and I give him power to mortgage, lease, or sell the estate, or any part or parts thereof, from time to time, and at all times or at any time, in any market, to any person or persons, upon such conditions or terms as he shall from time to time in his own absolute will and pleasure determine. Provided always, that he shall not sell either during his own life or during the life of B." I think, when you write out the devise in full in that way, every one would say that the condition is repugnant to the grant which has been previously made, and, of course, if the matter had stopped there, there would have been no difficulty whatever in this case. The question to be determined would have been simply whether the condition was in whole or in part repugnant to the gift to which it was annexed, and if so it would necessarily be void.

But it is impossible to shut one's eyes to the fact that some exceptions at all events have been made to this general law. The general law seems to me to stand upon principles about which there can be no doubt, and which are easily intelligible. But in the very next section of Littleton, sect. 361, there is this: "But if the condition be such, that the feoffee shall not alien to such an one, naming his name, or to any of his heirs, or of the issues of such an one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good." I confess I am absolutely at a loss to understand how that exception arose, because it is plainly just as much repugnant to the gift as any other condition would be, for the implied power given to alien to any person or persons he pleases, includes a liberty to alien to J. S., if he chooses to do so. It seems to me that, unintentionally and unwittingly, another principle has been applied here (forgetting entirely that the question whether a condition was

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good or bad should be determined by its repugnancy to the prior gift), and that the question of policy has been allowed to intervene, omitting altogether all considerations of repugnancy. Just as a general restraint of marriage was always held to be bad, but a restraint of marriage to one particular individual was held to be good, so, in the same way, although a restraint of alienation in general was decided to be bad, it seems to have been thought that a restraint of alienation to one individual or his issue was not bad. I confess I wish that the law had been allowed to stand on the simple question of repugnancy, because then there would have been no uncertainty and no confusion. In *Muschamp* v. *Bluet* (1), an attempt was made to introduce a converse condition, that is, a condition that the devisee should alien only to one individual named, and that was held to be bad. But it is impossible not to see that, although that was held to be bad, the principle of the decision has certainly been departed from in later times; I refer to those cases which led up to *In re Macleay* (2), before Sir George Jessel, M. R. There are two older cases, viz. *Daniel* v. *Ubley* (3) and *Doe* v. *Pearson* (4). Those cases were followed by *Attwater* v. *Attwater* (5) before Lord Romilly, M. R., and, finally, by *In re Macleay* upon which I shall have to make some observations. They do not actually meet the present case, because they were not cases of restraint of alienation for a limited time as this is, but of restraint of alienation except to a particular class of persons, and the question was whether the condition was within the rule as being repugnant to the gift. In *Daniel* v. *Ubley* (3) the devise was, "I give and bequeath to Agnes, my wife, my house, &c., to dispose at her will and pleasure, and to give to such of my sons she thinks best." It appears that Jones, J., thought that the wife had an estate for life, with power to dispose of it at her pleasure during her life, and a power to give the reversion to any one of the sons of the devisor. If that is really a correct translation of the devise,—that the widow took merely an estate for life, with a power to appoint the estate in reversion to any of the sons, I need not say that *Daniel* v. *Ubley* (3) would not touch the present question at all, and I cannot help thinking that, if *Daniel* v. *Ubley* (3) were to be decided at the present day, the opinion which was

(1) Sir T. Bridg. 132.
(2) L. R. 20 Eq. 186.
(3) Sir W. Jones, 137.
(4) 6 East, 173.
(5) 18 Beav. 330.

expressed by Mr Justice Jones would be held to be substantially right. But it is impossible to ingnore the fact that different Judges have taken different views.

I will now read from the judgment of Sir G. Jessel, M. R., in *In re Macleay* (1), because it is sufficient for me to refer to what he there quotes from these cases. He cites Lord Ellenborough in *Doe* v. *Pearson* (2); and Lord Ellenborough says, "For, according to the case of *Daniel* v. *Ubley* (3), though the Judges did not agree as to the effect of the devise, yet in that case it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and, if she did not, that the heir might enter for the condition broken." Now that is a stronger case still, because, as Lord Ellenborough and the other Judges of the Queen's Bench read *Daniel* v. *Ubley* (3), all the Judges agreed in the time of Sir W. Jones that it was good to give a woman a fee simple with a condition to convey it to one of the sons of the devisor; that is, she could not convey it to any body else; it was limited. The Master of the Rolls continues (4), "There Mr. Justice Dodridge 5) said, 'He conceived she had the fee, with condition', and if she did alien, that then she should alien to one of the children, which is a very limited class; and he finally concluded by saying that, 'her estate was a fee, with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons'." With all respect to the memory of Mr. Justice Dodridge I think that sentence shews that the two parts of the gift are about as repugnant as could well be. He first says that the estate was in fee, with liberty to her to alienate if she would, and then follows, "but with a condition that if she did alienate then she should alienate to one of her sons." How the two could co-exist I honestly say I cannot understand. Then Sir G. Jessel, M. R., says (6), "in *Doe* v. *Pearson* (2) the gift was a gift in fee upon this special proviso and condition, 'That in case my said daughters Ann and Hannah Collett, or either of them, shall have no lawful issue, that then and in such case, they and she having no lawful issue as aforesaid shall have no power to dispose of her share in the said

(1) Law Rep. 20 Eq. 186, 190.
(2) 6 East, 173.
(3) Sir W. Jones, 137.
(4) L. R. 20 Eq. 191.
(5) Latch. 37.
(6) L. R. 20 Eq. 190.

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estates so above given to them, except to her sister or sisters, or to their children. Now it is to be observed that the number of alienees possible in that case was smaller than the number in this case; there it was limited to 'her sister or sisters, or their children.' * * * So that the case of *Daniel* v. *Ubley* (1) is also stronger than the present. In the first place, it was a prohibition, not merely against selling, but against all alienation; and in the next place, the class was limited to one of the sons of the devisor; but yet the Judges gave an opinion that it would be good, and following that old authority, Lord Ellenborough and the Judges of the Queen's Bench, in *Doe* v. *Pearson* (2), in the year 1805, held that the condition was valid."

I ask myself, and with all respect I hope for the learned Judges who decided those cases, what was the principle upon which they went, and how by any possibility that principle is to be applied to other cases in the future? In *Daniel* v. *Ubley* 1) the widow was to alienate to one of her sons; in *Doe* v. *Pearson* (2 the discretionary power of alienation was limited "to her sister or sisters, or their children." What am I to say is the principle? Is it that there may be a condition that, if you alienate, you must alienate to a member of your own family, or that you must look to the number of the individuals to whom the alienation is permitted, or when there are a number of individuals (not knowing at the present moment what that number may be), am I to inquire whether they are able, or likely to be willing, to purchase the property to which the condition is attached? If they are able and willing to purchase the property, am I to say that the condition is good, and if from their poverty they are unable, or from other circumstances are unwilling, am I to say that the condition is bad? It seems to me that the adoption of any such rule as that would produce the greatest uncertainty and confusion; in fact it would be absolutely impossible for any Judge to apply such a rule to any case which might come before him, unless the facts of the case were absolutely identical with those of some previously decided case.

In *Attwater* v. *Attwater* (3), no doubt, Lord Romilly challenged the correctness of the decision in *Doe* v. *Pearson* (2). In *In re Macleay* (4) Sir G. Jessel, M. R., thought that, as *Doe* v. *Pearson* (2) was decided in the year 1805, it was too late to go contrary to it, and,

(1) Sir W. Jones, 137.
(2) 6 East, 173.
(3) 18 Beav. 330.
(4) L. R. 20 Eq. 186.

having in *In re Macleay* (1) a devise which was very similar to that in *Doe* v. *Pearson*, (2) he followed what he conceived to be the rule in *Doe* v. *Pearson* (2) and decided that the condition in *In re Macleay* (1) was a valid condition. If there were nothing else in *In re Macleay* (1), I do not think I need have discussed it any further, because the condition with which I have now to deal is not like the conditions in any one of the cases to which I have referred. But, no doubt, there are some observations of the Master of the Rolls in *In re Macleay* (1) which were very strongly and very properly relied upon by Mr. Barber, because the authority of Sir G. Jessel is very great. I cannot possibly ignore those observations, and I feel bound to take exception to them, for I cannot agree with the propositions which they lay down. After citing those sections from Littleton to which I first referred, and also referring to *Muschamp* v. *Bluet* (3), Sir G. Jessel M. R., says (4): "So that, according to the old books, Shepard's Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance and not of mere form." I apprehend that the meaning of the word "substantially" is this. Does it really deprive the devisee of the power of alienation, or does it only so restrain it that in effect he still has the power of alienation? If the latter, it is good. The Master of the Rolls continues: "Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction or alienation in that way. Then again, it is limited as regards class: he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shews there were a great many members of the family when she made her will; a great many are named in it; therefore you

(1) L. R. 20 Eq. 186.
(2) 6 East, 173.
(3) Sir J. Bridg. 132.
(4) L. R. 20 Eq. 189.

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have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this w[illegible] it is limted to the life of the first tenant in tail; of cours[illegible], if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation, and unless Coke upon Littleton has been overruled, or is not good law, this is a good condition." With all deference to Sir G. Jessel, I do not find in Coke upon Littleton that which he seems to have found, and I must say this, that when you refer to Coke upon Littleton, with all deference to that learned Judge, one must bear in mind that he was not always consistent with himself. I find, for instance, this (1): "And yet if a man make a gift in tail, upon condition that he shall not make a lease for his own life, albeit the estate be lawful, yet the condition is good, because the reversion is in the donor." When, however, I I turn to *Sir Anthony Mildmay's* case (2), I find this: "So if a man makes a gift in tail, on condition that he shall not make a lease for his own life, it is void and repugnant." I find also this (3): "If a man make a gift in tail, upon condition that he shall not make a lease for three lives, or twenty-one years, according to the statute of 32 Hen 8., the condition is good, for the statute doth give him power to make such leases, which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the Act, according to that rule of law, *quilibet potest renunciare juri pro se introducto.*" And in *Mary Portington's case* (4), there is this: "For suppose that a man makes a gift in tail, and further grants, that he may make leases for years or lives according to the said Act; or to levy a fine with proclamations according to the Acts in such case to bar his issues; provided always, that he shall not make leases, or levy a fine; none will deny but such proviso would be repugnant; and, by consequence, in the other case, when such incidents are tacitly implied"—that is, whether the incidents are mentioned or not, you cannot make a condition of that kind. I think, therefore, Lord Coke must be read with a certain amount of caution, and I may say that, if any one will take the trouble to read two or three passages in Sheppard's Touchstone, he will find that the learned professors of the law are perpetually at loggerheads as to what

(1) Co. Litt. 223 b.
(2) 6 Rep. 43 a.
(3) Co. Litt. 223 b.
(4) 10 Rep. 39 a.

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In re Rosher. Rosher v. Rosher.

is a good condition, and the reason is that they have departed from the first principle, that a condition which is repugnant to a gift is a void condition, and the exceptions have been made without any principle at all, and it is therefore perfectly impossible to say by any rule what exceptions are good and what are bad.

I should be very sorry to do Sir George Jessel any injustice, and I must honestly say that in attempting to criticise so able and learned a Judge I am always afraid of falling into some error myself, and I am not quite certain that I understand correctly the extent to which in those passages he means to go. If he means to assert that, provided you give a power to mortgage or lease, you may restrain the power to sell, all I can say is, that I most respectfully differ from him, and I can not understand how, after he had cited the maxim from Coke which he had quoted, he should have tried to lay down any such doctrine. Applying what he says to the present case, does he mean that, the estate being worth £15,000, although there is a restriction against selling, the son might immediately mortgage it for £15,000, or might lease it for 999 years? I can only say that it seems to me that both those things are hit by the maxim which he quotes with the greatest approbation, *quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum*: and that this would be an infringement of any such condition is proved (if proof were wanting) by *Large's Case* (1), where, there being a gift to a son with a condition annexed to it that he was not to alienate within a particular time, he having granted four leases for sixty years to begin one after the other, it was held that they came within the prohibition. And in any case, if you are to hold that, though there is a prohibition of sale in the ordinary sense of the word "sale" still you may dispose of the estate in any other way, the condition so construed to my mind would be an absurd one; and, if not absurd, I am perfectly satisfied that the Court would never now allow advantage to be taken of it because something had been done in one way which might have been done effectually in another way.

It still remains for me to consider whether there is an exception that a condition absolutely restraining alienation is good where there is a limitation as to time; because, although I have dealt with these cases in order to clear the way with regard to the foundation upon which all the exceptions rest, still, as I hold that the exceptions stand on a principle absolutely removed from that of

(1) 3 Leon. 182.

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repugnancy, there may yet exist an exception which can be made to the condition, and which will be good by reason of a limitation of time.

The authority cited to shew that this is so is *Large's Case* (1). I am going to cite it from the American case, *Manllebaum* v. *Mc Donell* (2), which contains a very elaborate and able judgment upon this part of the case. The very same point which arises now arose then before the American Court. The judgement of the American Court refers to *Large's Case* (1) thus: "As reported (3) the same devise is stated as follows:—'*A*, seised of lands in fee, devised the same to his wife till William, his younger son, should come to the age of twenty-two years, the remainder when the said William should come to such age, of his lands in *D* to his two sons, Alexander and John, the remainder of his lands in *C* to two other of his sons, upon condition *quod si aliquis dictorum filiorum suorum circumibit vendere terram suam*, before his said son William should attain his said age of twenty-two years, *in perpetum perderet eam*'." It seems to have been held by the text-writers that this therefore was a condition attached to a devise, not to sell within a limited time, and that that condition was good, because it was held that one of the sons, who had gone about to grant leases for terms of sixty years in succession, had broken the condition, and that the breach of the condition might be taken advantage of. But Mr. Justice Christiancy points out, I think with perfect accuracy, that when you come to look at the case there was no devise of the fee simple of that kind. There was only a contingent remainder limited to the son, upon condition that before he came into possession, that is to say, before he attained twenty-two, he should not sell. That being so, the son having sold before that time, it was held that he could not qualify himself to take under the contingent remainder, that the contingent remainder therefore failed altogether, and the estate passed away from him. Now the first citation of this case which deals with it as if it had decided that a limitation as to time made a condition of this kind good is in a note in the 7th edition of Sheppard's Touchstone (4) (it is not in Shepphard's Touchstone itself). The note originally ran thus: "And the grantee may be also restrained from alienating for a particular

(1) 2 Leon. 82; 3 Leon. 182.
(2) 18 Amer. Rep. 61, 80.
(3) 3 Leon. 182.
(4) Page 130.

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time: *Large's Case* (1)." Then Mr. Preston adds in brackets, "Being a reasonable time; not trenching on the law against perpetuities," and the note thus inserted in Sheppard's Touchstone has no doubt been copied into a good many other text-books. But there has been no judicial decision to that effect; and it is a very curious thing that, although Littleton's book is more than 400 years old, and although lord Coke died 250 years ago, there is not a single judicial decision to be found in the books shewing that a limitation as to time added to such a condition makes it a valid condition. I perfectly admit that, although there has been no such judicial decision, yet if I could find that this had been an accepted *dictum* of law, and that it was likely to have affected divers contracts and dealings between man and man, and that by not following it I should be disturbing anything which had been done in former times over and over again on the faith of the *dictum*, I should feel myself bound by it and I should decline to decide in opposition to it. I hold most strongly that what the present Master of the Rolls (then Brett, L. J.) said in *Lohre* v. *Aitchison* (2), in regard to policies of insurance, ought to be applied to all doctrines affecting conveyances. He said: "The dispute thus raised is one with regard to the mode of ascertaining the amount of a loss under a policy in ordinary form, and of adjusting that amount when ascertained. Such disputes have for a long period been determined according to recognised rules. As many of the arguments presented to us seemed to trench violently on several of those rules, it appears to us advisable to state our view of the binding force of those rules, and the reasons why they have a binding and exclusive force. They are rules which originated either in decisions of the Courts upon the construction or on the mode of applying the policy, or in customs proved before the Courts so clearly or so often as to have been long recognised by the Courts without further proof. Since those decisions and the recognition of those customs, merchants and under-writers have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract. And though a Court now might differ from the correctness of the rules as originally laid

(1) 2 Leon. 82; 3 Leon. 182.

(2) 3 Q. B. D., 558, 561.

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down, it must yet now act upon those rules as parts of the contract, or as agreed modes of carrying it out." I think it would be exceedingly mischievous to attempt to alter any rule which had been adopted and acquiesced in for more than a century. But in the present case I am bound to say that I cannot imagine that this supposed rule has ever been acted upon, because, to begin with, it is so vague that I am perfectly certain that no Counsel capable of advising a client would have advised his client to act upon it without better information than we possess at present as to what the rule means. What is the meaning of "a reasonable time"? Does it extend, as Mr. Preston thinks, to a time so long that it does not trench on the law against perpetuities? Does it simply extend to the life of the individual himself, or to the life of some other person, or is it to be applied in different cases according to the circumstances of each case? Is each Judge before whom the question comes to decide whether the time mentioned in the particular condition is a reasonable time, or is it to depend upon some other unknown quantity which this Court has yet to decide? I find that the original rule which says that you cannot annex to a gift in fee simple a condition which is repugnant to that gift is a plain and intelligible rule. So far as I can find that any exception to the rule has been laid down and judicially decided, I am bound by that exception. But I will not add other exceptions for which I can find no authority, and the addition of which, to my mind, will only introduce uncertainty and confusion into the law which we have to administer. I must therefore, as regards the condition which relates to selling, declare that it is void.

I have now to deal with the condition as to leasing. It is agreed that the real leasing value of both the properties was £100 per annum. I will assume in favour of the condition that it does not enable the widow to require an indefinite lease, I mean a lease for 999 years or for a very long period, but that the utmost she could require would be a lease for the period of her own life. I think, nevertheless, that the same principle applies to the power of leasing as to the power of sale, and for the reasons before given, because the power to lease is just as much an incident to an estate in fee simple as the power to sell; and inasmuch as the restriction amounts to this, that the widow is to have a lease at one-fourth of the real rent, I think that it is an absolute restriction in the one case upon leasing for more than three years, and is void. The condition as to leasing the other property is practically the same, and is void for the same reason. I must, therefore, answer the ques-

tions by saying that both the restriction upon the power of selling and the restriction upon the power of leasing are invalid.

NOTE.

This case is an illustration of the principle affirmed in *Bradley* v *Peixoto*, 3 Ves. 324, namely that conditions or restraints inconsistent with and repugnant to any estate or interest to which they are annexed are absolutely void. The leading case decides that a condition in absolute restraint of alienation annexed to a devise in fee even though its operation is limited to a particular time, for example, to the life of another living person is void in law as repugnant to the nature of an estate in fee. The distinctions which are recognised in this branch of the law are somewhat refined, for instance, while a condition annexed to a devise in fee not to alienate to a particular person or persons or not to alienate out of a class has been supported, a condition not to alienate except to a single individual has been held to be invalid (Co. Litt. 223; *Re. Macleay* L.R., 20 Eq. 186). For comments on the leading case and other cases of the same class, reference may be made to Mukhopadhaya on the Law of Perpetuities, Tagore Lectures 1898, pp. 284-289.

Reference should also be made to Secs 10 and 11 of the Transfer of Property Act.

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VAN GRUTTEN
v.
FOXWELL.

[*Reported*, (*1897*) *Appeal Cases*, *658*.]

1897. July, 5.

The original appeal arose upon the will of William Harris as follows :—

William Harris, being the owner in fee of lands in Cornwall, by his will made October 31, 1804, devised his lands to trustees and to the survivors and survivor of them and the heirs of such survivor in trust to receive the rents and profits to and for the use and benefit of such of his child or children as should be living at the time of his death, and to pay and apply such rents and profits, or so much thereof as the trustees should deem right and proper, in and about the maintenance and education of such child or children until they should severally and respectively attain the age of twenty-one years or be married ; and from and after such child or children should have attained the age of twenty-one years or be married, then in trust to permit and suffer such child or children, as they should severally attain the age of twenty-one, or be married, to receive and take the rents and profits, if more than one, in equal shares for her, his, and their own use and benefit for the term of her, his, and their life or lives ; and if he left only one child then to permit and suffer such one child to receive the rents and profits for her or his sole use and benefit for the term of her or his life. The testator declared that his will was that from and after the death of such child or children, the trustees should stand seised of the lands devised to them in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one, to be equally divided between them, such lands to be legally conveyed and assured unto such heirs of any child or children in equal shares as they should severally and respectively attain the age of twenty-one years, or be married, and to their several and respective heirs and assigns for ever. Power was given to the trustees in the meantime to apply the rents and profits in and about the maintenance and education of such heirs of his child or children. The gift over was introduced in these terms : "And if it shall happen that I shall depart this life leaving no child or children, or issue of any child or children, or if such child or children as I shall leave, and the issue of such child or children, shall die before he, she, or they shall attain the age of twenty-one years or be married, then" a gift over

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to collateral relatives. The will appointed the testator's daughter Mary Harris residuary legatee and devisee.

The House took time for consideration and delivered judgment on July 5, in the appeal first as follows :—

Lord Herschell. My Lords, the decision of this case turns principally upon the construction of the will of William Harris, dated October 31, 1804. The question is whether his daughter Mary took under his will an estate tail or only an estate for life. [His Lordship stated the parts of the will above set out.] The question is whether, upon the true construction of the provisions I have referred to, the rule in *Shelley's Case* (1) applies, so that the testator's daughter took an estate tail, or whether, as contended by the appellant, the son of that daughter took the fee by purchase.

It is well settled that if the estate taken by the person to whom the lands are devised for a particular estate of freehold and the estate limited to the heirs of that person are not of the same quality, that is to say, if the one be legal and the other equitable, the rule in *Shelley's Case* (1) has no application. If they are either both legal or both equitable, the rule applies. Although the legal estate is in the present case vested, in the first instance, in the trustees, there is no doubt that the language of the will by which the trustees are to permit and suffer his child (if only one) to receive the rents and profits for her sole use and benefit, is sufficient, if those words stood alone, to pass the legal estate to the testator's child. It is equally clear, however, that the trusts of the will require that prior to his child attaining twenty-one the legal estate should be in the trustees, and that it should again be in the trustees after his child's death. Where there are such dispositions as are to be found in the present case, I think the true view is that the legal estate remains throughout in the trustees, and that the estate of the beneficiaries is equitable only. This view is supported by the authority of *Harton* v. *Harton* (2) and other cases, and I think it is both a convenient and a sound one.

I proceed now to consider whether the terms of the devise vested in Mary Harris an estate tail. If the devise had ended with the words "unto and to the use of the heirs of the body and bodies of such child, if more than one, to be equally divided between them," it would have been, I think, beyond controversy that Mary Harris took an estate tail. The rule in *Shelley's Case* (1) cannot, I think,

(1) 1 Rep. 93b.
(2) (1798) 7 T. R. 652.

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be regarded as a mere rule of construction designed to carry out the intentions of the testator, and which will therefore yield to any indication of a contrary intention to be found in the will. It is a rule of law that where an estate is devised to the "heirs" or "heirs of the body" of a person to whom a prior estate of free-hold has been given, the heirs take by descent, and not by purchase, and that an estate in fee simple or in fee tail is created in the ancestor. A testator can no more make such a devise and direct that it shall not have this operation than he can, in terms, create an estate in fee simple or an estate tail, and then direct that these estates shall not have the incidents which the law annexes to them. If words be superadded purporting to have that effect they must be treated as absolutely ineffectual. So, too, must words inconsistent with the possession of an estate tail or in fee simple by one to whom a life estate has been devised, with a subsequent limitation to his heirs, special or general.

At the same time, if the words which are added, or, indeed, any provisions to be found in other parts of the will, shew that the expression "heirs" or "heirs of the body" was not intended to be used in the ordinary legal sense, but was intended to designate some individual person or particular class of persons, effect may be given to the intention of the testator thus expressed. The rule in *Shelley's Case* (1) does not then apply, because the limitation after the estate for life is not upon the true construction of the will to the heirs or heirs of the body of the tenant for life in the legal sense of those words, any more than it would have applied if the gift had been in terms to a designated person or a designated class.

I do not propose to travel through the authorities. They certainly cannot all be reconciled; but the decisions in this House by which your Lordships are governed, to my mind, amply support the view I have expressed. Since writing the above I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Macnaghten. I entirely agree with the observations he makes as to the origin and scope of the rule. A study of the authorities had led me to the same conclusion, and I find it quite unnecessary to repeat in language probably less felicitous the reasons which he has so pithily and lucidly expressed. I think that the introduction of the notion of a "general intent" and a "particular intent" on the part of the testator, the latter intent yielding to the former, tended to put matters on the wrong track, and to suggest

(1) 1 Rep. 93b.

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that the estate which the devisee took depended after all on the intention of the testator, and not on the effect which the law gave to a devise in particular terms.

I have then next to inquire whether there is anything to be found in the present will which interprets the expression "heirs of the body and bodies of such child or children", and shews that those words were not employed in their legal sense. Mr. Haldane, in his very able argument, relied mainly for this purpose on the provisions which immediately follow. He did not indeed contend that the words "to be equally divided between them" would of themselves suffice to have this effect: the authorities were too strongly against him for such a proposition. But he maintained that, taken in conjunction with the subsequent direction to the trustees to convey to "such heirs" in fee and with other provisions of the will, there was enough to shew that the testator could not have used the words "heirs of the body and bodies of such child or children" in their legal sense, or intended thereby to designate the whole stock of inheritable descendants of his child or children in due course of succession. I am unable to accede to this argument. I can find nothing in the will which inevitably leads to the conclusion that the testator used the word "heirs" in a sense other than its ordinary legal one. Indeed, so far from demonstrating that the testator cannot have employed it in its legal signification, the provisions relied on appear to me to be quite consistent with the creation of an estate tail or estates tail in his child or children. The difficulty said to be occasioned by the use of the words "to be equally divided between them" is a difficulty only if you assume that they are intended to apply in case the testator has only one child, and that child has more than one son—a gratuitous assumption, as it seems to me, for the words are properly applicable in the case of more than one child of the testator having an heir of the body, and this sufficiently explains their presence in the will without supposing that by "heirs of the body" the testator meant something else.

Again, what is there inconsistent with the creation of estates tail in his children that the testator should direct his trustees to convey the reversion in fee to the heirs of the tenants in tail at a particular time? It is, no doubt, a peculiar provision, but it is not nonsensical or incapable of legal operation, though it might, of course, be defeated by his children barring their estates tail.

The testator's daughter Mary did, by an instrument bearing date February 28, 1835, purport to bar her estate tail. Vaughan Williams, J., held that she had not effectually done so, inasmuch as

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he thought it was proved that she was not at that date of sound mind. The law required that before executing the deed she should be examined before Commissioners, and it could only be executed if they certified that she was of full age and competent understanding, and if an affidavit was lodged containing a statement to that effect. All this was done; and against this testimony in favour of her sanity the only evidence was the finding of a jury on an inquisition of lunacy taken in December, 1843, that Mary Hurtley was then of unsound mind, and had been in the same state of unsoundness of mind from October 31, 1834. I agree with the Court of Appeal in thinking that this finding is not sufficient to out-weigh the evidence afforded by the circumstances to which I have called attention. It would, in my opinion, be very dangerous to allow a deed executed by a married woman, who was certified at the time to be of competent understanding, to be treated as null and void merely because a jury more than nine years afterwards found that her insanity dated from a period prior to its execution.

I agree, then, with the Court of Appeal in thinking that an estate tail vested in Mary Hartley, that it was converted into an estate in fee simple by the disentailing assurance if that deed was valid, and that in that case descent must be traced from her as the last purchaser.

The respondents claimed as the heirs of William Harris, treating him as the last purchaser. Although the Court of Appeal came to the conclusion that Mary Hartley, and not William Harris, was the last purchaser, they affirmed the judgement for the respondent on the ground that they were the heirs of Mary as well as of William. It appears that in the course of the argument before the Court of Appeal the point was made that if Mary Hartley had effectually converted her estate tail into an estate in fee, and if she had by will validly disposed of her estate, the title of the respondents would be ousted, and it was alleged that such a will existed. The appellant's counsel thought that this point was reserved to them, and I gather that it was so intended by the Court, and that owing to some oversight, due probably to the Court being differently constituted when the judgement was delivered, the judgment was simply affirmed, which deprived the appellant of any opportunity of raising it. I think he is entitled to that opportunity. The respondents claimed as heirs of William Harris. If they had been right in this it would not have been necessary to shew that Mary Hartley had made a testamentary disposition. But if they are permitted, and I think quite rightly, to claim

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by descent from Mary, this is a different case, and I think the appellant must be allowed, on the other hand, to meet it in any way, he can, which he has hitherto not had an opportunity of doing.

I think, therefore, that the respondents should be allowed to amend their pleadings by claiming in the alternative from Mary as the last purchaser, and that the appellant should be allowed to make any amendments to meet this case that he may think fit, and that there should be a new trial to determine the issues thus raised. I think it should be made a condition that the appellant should admit the pedigree which the jury found proved, but that it should be open to either party to produce additional evidence on the question whether Mary Hartley was of unsound mind when she executed the disentailing deed.

My Lords, with regard to the mode of trial, if there should be local evidence to be adduced by either party, it would probably be the most convenient and economical course that the trial should be had locally. If, on the other hand, there is no oral evidence which would require witnesses from the country to be called, probably the most economical course would be that the case should be tried before a Judge in London. Of course, it is impossible for their Lordships at the present time to give any direction upon that point, but they have no doubt the parties will agree, as there is to be a new trial, upon the most economical course for disposing of the issues which will be then raised.

Lord Watson. My Lords, in this case I have come to the same conclusion as your Lordships, and I concur in the judgment which has been moved by my noble and learned friend on the Woolsack.

The rule in *Shelley's Case* (1) has been obscured rather than elucidated by an accumulated mass of decisions, but it must be taken as restored and established by the decision given by this House in *Jesson* v. *Wright* (2), and as subsequently explained by the noble and learned Lords who gave judgment in *Roddy* v. *Fitzgerald* (3). I have only to add that, having considered it to the best of my ability, I am prepared to agree with the elaborate opinion which is about to be delivered by my noble and learned friend near me (Lord Macnaghten).

Lord Macnaghten. My Lords, the point in this case turns upon the effect of the first set of limitations in the will, dated

(1) 1 Rep. 93b.
(2) [1820] 2 Bli. 1.
(3) [1858] 6 H. L. C. 875.

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October, 31, 1804, of William Harris, who died in 1815. And that depends upon the question whether those limitations are so framed as to attract the rule commonly known as the rule in *Shelley's Case*.(1)

The subject, which was discussed with great learning and ability at the bar, so rarely comes up for discussion now-a-days that I make no apology for reminding your Lordships of the precise terms in which the rule was stated in the case from which it takes its name. The statement is this (2). "It is a rule in law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase."

Every part of that statement is, I think, deserving of attention, from the opening words, which declare the rule to be a "rule in law," to the last clause, which says that heirs can never take by purchase in a case to which the rule applies. It is hardly necessary to observe that any expression which imports the whole succession of inheritable blood has the same effect in bringing the rule into operation as the word "heirs," though, perhaps, it was not so always (3), and though it seems to have been thought at one time, and, indeed, it was argued as late as 1844—*Harrison* v. *Harrison* (4)—that, in the absence of technical words, the governing principle was not the rule in *Shelley's Case* (1), but the doctrine of cy-pres.

The rule has a curious history. No one can tell who its author was. It may be traced in the Year Books as far back as the time of Edward II, but no one can fix the date when it was first recognised. No one knows for certain how it came to be laid down. Even the purpose of its being has been the subject of controversy. The better view seems to be that it is a rule of tenure founded on feudal principles, and that its purpose was to prevent the lord being defrauded of the chief fruits of seigniory. It has been said that the rule was intended to protect the inheritance from abeyance, which either means the same thing or else means very little. Others, rather I think in anticipation of the course of events and the development of modern ideas, have discovered that it was designed to facilitate the alienation of property and the satisfaction

(1) 1 Rep. 93b.
(2) 1 Rep. 104a.
(3) 1 Rep. 106b, n. I. 5.
(4) [1844] 7 Man. & G. 938.

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of the ancestor's debts, while one very learned writer is of opinion that its main object was to exclude the possibility of creating "an amphibious species of inheritance," calculated to introduce confusion and disorder into the system of our law. (1) Nor are learned writers on the subject agreed as to the mode in which the rule operates. On the one hand, it is assumed that the limitation to the heirs by virtue of some force of attraction unites and coalesces with the limitation of the freehold to the ancestor, and thus operates to vest in time a fee simple or a fee tail, as the case may be, divided or split by intervening limitations, where there are any. On the other hand, it has been maintained with much plausibility that there is no such union or consolidation, but that the limitation to the heirs is executed in the ancestor, to whom a gift is implied, so as to vest in him another and a larger estate, in which the particular estate of freehold becomes merged when there are no intervening limitations. That was Mr. Hayes' view, and I rather think it was Mr. Preston's view, too. It has some support in expressions used by Yates J. and other Judges, and it has at least the merit of getting rid of the stumbling block which the opponents of the rule find at the very threshold. If the rule operates by merger it matters not how anxiously or how strictly the particular estate is tied down and confined to a mere life estate.

Whatever may have been the origin of the rule, and whatever may be its mode of operation, it cannot, I think, be denied that the rule was accepted without question in the earlier period of its existence. So much was it part and parcel of the law of England, that for a long time it had no distinctive name of its own. There could have been little hostile criticism then. And, indeed, we know, from what Lord Eldon himself has said, that that great Judge, whose habitual caution justifies or illustrates Lord Coke's aphorism, Co. Litt. 338a, that "the most learned doubteth most," was convinced that there was at least one case about which he would have had no sort of hesitation, if only his lot had been cast in the clearer atmosphere of olden days. If he had lived, he says, two hundred years earlier, he would have had no doubt that such limitations as were to be found in *Jesson* v. *Wright* (2) would have given an estate tail. But before the time of *Jesson* v. *Wright* (2) there had come a change. Things were not going well with the

(1) Yet another explanation is proposed by the learned editors of Goodeve's Modern Law of Real Property (Sir Howard Elphinstone, Mr. James W. Clark, and Mr. Arthur Dickson), 4th ed. 1897, p. 239.—F. P.

(2) 2 Bli. 1, 13.

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rule. Its feudal origin was a disgrace. Its antiquity was a reproach. Some Judges thought that on those grounds it ought to be "discountenanced."(1) Then it was constantly made a matter of complaint that the rule disappointed the intention, as if that were not its very end and purpose—as if it had not been at the outset "levelled against the views of the parties:" Preston, Succinct View, p. 13. It was always being disparaged, and, what was perhaps worse, it was always being explained. It led to profound discussions and to some very pretty quarrels. One object of Mr. Fearne's famous work was to refute Lord Mansfields' heresies in *Perrin* v. *Blake* (2), then under appeal to this House. Unfortunately in a later edition the author suggested or proved that Lord Mansfield had not always been true to his own mistaken creed. That, of course, was an imputation not to be borne: it was resented and repelled from the Bench: *Hodgson* v. *Ambrose* (3), and so Lord Mansfield and Mr. Fearne differed and quarrelled. Lord Thurlow and Mr. Hargrave agreed in every thing, and they quarrelled too. They had been friends. "The rule in *Shelley's* Case." (4) so Mr. Hargrave tells us (3 Juriscon Ex. 406), "had often been discoursed upon" between them. Their friendship stood that strain. But when Mr. Hargrave laid the fruits of his labours before Lord Thurlow, and proposed to introduce a complimentary reference to the Chancellor, who had shewn in *Jones* v. *Morgan* (5) that he once enjoyed a vision of the true doctrine in its primitive simplicity, Lord Thurlow felt it was time to draw back. He acknowledged the imperative character of the rule. On that point he was as sound as Mr. Hargrave himself, whose treatise would have borne the proud motto "Aut Cæsar aut nullus," but for fear that some unkind critic might misread the allusion and mock the author. So far those great lawyers were at one. But Lord Thurlow thought that Mr. Hargrave was making too much fuss about his work of discovery or restoration, and he was not, I fancy, altogether certain what part was being reserved for the Lord High Chancellor, whether he was to come in as the master or the disciple. At any rate, his reply was cold and distant. He sends his best respects to Mr. Hargrave. "For himself," he writes (3 Juriscon. Ex. 360) "he really does not remember the time when he thought the application of the rule in *Shelley's Case* (4) could depend upon

(1) 1 Coll. Jur. 297.
(2) 1 Coll. Jur. 321.
(3) [1780] 1 Doug. 343.
(4) 1 Rep. 93 b.
(5) (1783) 1 Bro. C. C. 205.

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anything else but the question whether the word 'heirs' was the designation of some particular person, or included successively all who might pretend to inheritable blood." That was putting the case in a nutshell.

But it is one thing to put a case like Shelley's in a nutshell and and another thing to keep it there. In spite of the simplicity of the view which commended itself to Mr. Hargrave and Lord Thurlow, and which indeed, was never at any time wholly obscured, there grew up a mass of decisions so numerous and so perplexing that, in Lord Eldon's opinion (1) "the mind is overpowered by their multitude and the subtlety of the distinctions between them"

Some have attributed this result to that most unsatisfactory doctrine of "particular intent" and "general intent," which practically destroyed both by rejecting the one and placing the other at the mercy of the first taker, a great favourite with Wilmot, C J. and with Lord Kenyon, but a doctrine that, in my opinion, if I may be permitted to say so, has all the merits and some of the dangers of those nostrums which are advertised as universal remedies. Others have traced the mischief in part, at least, to that impatience of criticism which at one time led the learned Judges of the King's Bench when returning their certificates to withhold their reasons. Others, again, think it may have been due to a more praiseworthy motive. Courts of law, it is said, in course of time became ambitious of keeping pace with Courts of Equity in discerning the intention of the testator and giving effect to it. The eminent Judge who always strove to be foremost in that race seems to have acted, not unfrequently, under the apprehension which he expressed in *Perrin* v. *Blake* (2), that "if Courts of law will adhere to the mere letter of law, the great men who preside in Chancery will ever devise new ways to creep out of the lines of law and temper with equity." Indeed, Lord Mansfield, as Lord Redesdale says (3), "seems to have considered that it manifested liberality of sentiment to endeavour to give the Courts of law the powers which are vested in Courts of Equity." The result is to be seen in a number of decisions which would be intelligible enough, and perhaps appropriate, if the Court were moulding limitations in order to give effect to executory trusts, but which are difficult to follow, and apparently out of place in the construction of legal devises. But

(1) 2 Bli. 50.
(2) 1 Coll. Jur. 321.
(3) [1803] 1 Sch. & Lef. 66.

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then Lord Mansfield thought that the distinction between an executory trust and a trust executed was a distinction not "founded in sense."(1)

At length by the decision of this House in *Jesson* v. *Wright* (2) in 1820, the law was restored, at least for a time. That decision, as it seems to me, starts with the principle that the rule in *Shelley's case* (3) is a rule of law—"inflexible," as it was termed by one of the noble Lords who spoke in the subsequent case of *Roddy* v. *Fitzgerald* (4), operating invariably, and, so to speak, automatically whenever the limitations are such as to call for its application. Proceeding on that footing, this House had only to construe the words of the will according to the established rules of construction. The most important of those rules for the purpose in hand was stated by Lord Redesdale in the following words: "The rule is," said his Lordship, "that technical words shall have their legal effect unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." What is to be understood by "otherwise" is shewn, I think, by the last words of the passage, in which the rule was repeated in *Roddy* v. *Fitzgerald* (5) "It is another and most important rule" said Lord Wensleydale, in the construction of the words used in a will, that technical terms or words of known legal import should have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to shew what that sense is."

The decision in *Jesson* v. *Wright* (2) covers, I think, the whole field of controversy. It makes it almost a work of supererogation to consult the earlier authorities. "No man can reconcile the decisions," as Sir E. Sugden very truly observed (6). The only touchstone one can use in trying to separate the true metal from the dross is the ruling in *Jesson* v. *Wright* (2). And therefore as new cases arise it seems to me to be safer to apply the ultimate test at once. For a time *Jesson v. Wright* (2) was loyally followed. In *Doe v. Harvey* (7) the Court of King's Bench acknowledged their error, and recalled their former decision. But very soon cases

(1) 1 Coll. Jur. 295.
(2) 2 Bli. 1.
(3) 1 Rep. 93 b.
(4) 6 H. L. C. 879.
(5) 6 H. L. C. 877.
(6) [1845] 3 J. & Lat. 50.
(7) [1825] 4 B. & C. 610.

occurred, such as *Right* v. *Creber* (1), in which proper effect does not seem to have been given to the authority of *Jesson* v. *Wright*. (2)

The most disappointing case of all, I think, is the Irish case of *Montgomery* v. *Montgomery* (3), before Sir Edward Sugden in 1845, on which Mr. Haldane so much relied. Everybody must acknowledge Sir Edward Sugden's profound learning. He was himself one of the counsel for the appellant in *Jesson* v. *Wright* (2), but though successful in the appeal, he does not seem to have welcomed the short and simple grounds on which the decision was rested : see Sugden on the Law of Property, 251, n. Perhaps the editor of Gilbert on Uses would have preferred that something should have been left of the old labyrinth through which he, at least, knew his way in the dark. His observation in *Montgomery* v. *Montgomery* 3), as he tells us, were made "with a view to clear up the doubts on this branch of the law." (4) The result was unfortunate. No difficulties were cleared up—no doubtful points explained ; and *Montgomery* v. *Montgomery* (3) is never cited except when it is desired to minimise the effect of *Jesson* v. *Wright* 2) and it is always cited then. There is a good deal in the earlier part of the judgemnt which is difficult to follow. In my opinion it is not an accurate view of the decision of this House in *Jesson* v. *Wright* (2) to say that it "only decided that the words 'heirs of the body' should operate as words of limitation where otherwise the issue could not take estates of inheritance." Except for the purpose of making that point good, I cannot understand why Sir E. Sugden should have suggested that *Doe v. Goff* 5) was not really overruled, and that "a similar case would be open to consideration." One of the two noble and learned Lords who spoke in *Jesson* v. *Wright* (1) condemned *Doe* v. *Goff* (5) in plain and direct terms. The other said it was "difficult to reconcile" with the case before the House Sir Edward Sugden on this remarks that the Lord Chancellor did not say it was impossible ; he said it was difficult. But the language is Lord Eldon's, and, as was observed of another Judge in another case, "it was a great deal *for him* to say." Over and over again in this House *Doe* v. *Goff* (5) has been treated as no longer law. In *Fetherston* v. *Fetherston* (6), which by the way is not referred to in *Montgomery* v. *Montgomery* (3), Lord Brougham

(1) [1826] 5 B. & C. 866.
(2) 2 Bli. 1.
(3) 3 J. & Lat. 47.
(4) 3 J. & Lat. 60.
(5) [1809] 11 East, 668.
(6) [1835] 3 Cl. & F. 67.

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observed that it was "entirely displaced" (1), and it is spoken of in the same way in *Winter* v. *Perratt* (2) and *Roddy* v. *Fitzgerald* (3). Again it is difficult to understand how the words "heirs of the body" when construed to mean children can have the effect of giving an estate of inheritance in a case under the old law where a gift to children, under the designation of children, would not carry *the fee*, and I must say I do not think that the case of *Burchett* v. *Durdant* (4) is any authority for such a singular proposition, which seems to be taken from the notes to Gilbert on Uses, published by Mr. Sugden shortly after he was called to the bar. Lastly, I cannot think that the passages which Sir Edward Sugden collected from the argument of Blackstone J. in *Perrin* v. *Blake* (5), and pieced together in his judgment in *Montgomery* v. *Montgomery* (6), convey an accurate representation of the meaning of that learned Judge. Undoubtedly Blackstone J. refers to the rule in *Shelley's Case* (7) as a rule of a flexible nature. But he did not, I think, mean that the rule as we understand it, and as it was understood in *Roddy* v. *Fitzgerald* (3), was otherwise than imperative. You may have a gift of an estate of freehold to the ancestor, and in the same will a gift to the heirs, so that the case is within the letter of the rule, and yet the rule will not apply, because the legal meaning of the word "heirs" has to yield to an explanatory context. It seems to me that all Blackstone J. meant was what Lord Alvanley expressed when he said: "The rule was not so rigid as to preclude the testator himself from explaining the words used :" *Poole* v. *Poole* (8). I think this would have been tolerably clear even from the extracts given in *Montgomery* v. *Montgomery* (6) if an important sentence had not been unfortunately omitted. "I am far from maintaining, "observes Blackstone J., in the sentence to which I refer. "that by a devise to a man's heirs or the heirs of his body they shall never take as purchasers in any case. But I have never observed it to be allowed except in one of these four situations." And then follow the four cases which Sir E. Sugden summarises, and refers to, apparently, as demonstrating an intention "to put an express negative on the general rule of law which vests in the person of the ancestor (when tenant of the freehold) an estate that is given to the heirs of his body." Now, it is to be

(1) 3 Cl. & F. 76.
(2) [1843] 9 Cl. & F. 686.
(3) 6 H. L. C. 881.
(4) [1690] 2 Vent. 311.
(5) Hargrave's Law Tracts, 489.
(6) 3 J. & Lat. 47.
(7) 1 Rep. 93 b.
(8) [1804] 3 B. & P. 620.

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observed that the first two cases are not within the rule in *Shelley's case* (1) at all. The rule has nothing to do with cases where there is no estate of freehold given to the ancestor, or no estate of inheritance given to the heirs. The last two cases fall outside the rule as soon as it is ascertained by the ordinary rules of construction that the words "heirs of the body" are the designation of a particular class of persons and do not comprehend the whole line of succession. I may observe that in the old books it is not at all uncommon to find the rule in *Shelley's case* (1) spoken of in this loose kind of way ; and, indeed, I cannot help thinking that much of the "profound and animated" discussion about the rule in *Shelley's case* (1), in which the greatest lawyers of the day contended for victory, was little more than a verbal controversy.

In connection with Sir Edward Sugden's view of Blackstone J's opinion, it is interesting and perhaps instructive to turn to what Lord Thurlow says of it in his correspondence with Mr. Hargrave. Blackstone J's judgment was not published in his lifetime, nor was it prepared for publication by him, nor was it among the papers which he directed his executors to publish. Lord Thurlow thought that it had not received his final corrections, and therefore ought not to have been published at all. He points out that there is some confusion in Blackstone J's classification of rules of law, and that he put the rule in *Shelley's case* (1) in the wrong category. The mistake, says Lord Thurlow, has occasioned some few incorrect expressions in the sequal of his argument. "All this, however," he adds (3 Juriscon Ex. 363), "by no means shows that he understood the rule in *Shelley's case* (1) to be a mere rule of interpretation ; on the contrary, it is treated throughout as a rule of legal policy, and the question is fairly put, whether there be any expression or declaration plain or necessary implication to control the sense in legal idiom of the word "heirs."

Lord Thurlow's views as judicially declared do not differ from the views contained in his correspondence with Mr. Hargrave, though they are not, perhaps, so simply or so clearly expressed.

In the case of *Jones* v. *Morgan* (2), to which I have already referred, Lord Thurlow says : "I take the rule in *Shelleys case* (1) never to have been shaken at all. I take that rule to be that where the heir takes in the character of heir, he must take in the quality of heir. I take the question always to have been as to the import of

(1) 1 Rep. 93 b.
(2) 1 Bro. C. C. 205.

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the word 'heir' in the propsed case." And again, in his final judgment, he says: "All *heirs* taking as *heirs* must take by descent. In cases where I can bring it to the point that the testator by the word 'heirs' as used in the will means first, second, third and other sons, there I change the words of the will.....The cases have been laboriously argued on points which I, therefore, dare not call immaterial. I think the argument immaterial that he meant the first estate to be an estate for life. I take it that in all cases the testator does mean so; I rest it upon what he meant afterwards.... ..All possible *heirs* must take as *heirs* and not as purchasers."

The authority of *Jesson* v. *Wright* (1) was restored, and its supremacy finally established in *Roddy* v. *Fitzerald* (2), and the question now in every case must be whether the expression requiring exposition, be it "heirs" or "heirs of the body," or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting.

I turn then to the first set of limitations in William Harris's will. To begin with, there is a sufficient estate of freehold given to the ancestor. It is hardly necessary to say anything about the estate or estates for life. The testator had one child at the date of the will, and he provides for the possibility of future issue. For the purpose of this case it is immaterial to consider whether the life estates of the testator's children, if there had been more than one, would have been followed immediately by estates of inheritance in the heris of their bodies, or whether in point of enjoyment the estates of the heirs special would have had to wait until the death of the last survivor of the tenants for life—a possible, but, in my opinion, rather an improbable construction on the face of this will.

Then we come to the gift to the "heirs of the body and bodies of the child or children" of the testator. It may be conceded that "the heirs of the body," whatever that designation means, were intended to take as the stock of a new descent, and to take by purchase. But that is immaterial. The first question seems to be: Is there anything to prevent the words "heirs of the body" being understood in their proper and legal sense? Mr. Haldane said there was. He said he could put his finger on four different places where the testator had shown a desire to depart from the

(1) 2 Bli. 1.
(2) 6 H. L. C. 823.

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regular course of descent in an estate tail. His point was, that although one or two, or even perhaps three, inconsistent or repugnant directions may be insufficient to control the proper meaning of the technical words, yet no case had ever contained so many eccentricities as this ; the testator had tripped so often that there must be a method in his tripping, and the Court was bound to find out the secret. If Mr. Haldane's premises were correct, would the circumstance on which he relied make any difference in the construction of the will? Would it not be just one of those "petty distinctions" reprobated in this House in *Jessone* v. *Wright* (1) and in *Roddy* v. *Fitzgerald* (2) but I differ from Mr. Haldane altogether. I cannot see any mistake in this part of the will, or any flaw in these limitations. The testator has used four different expressions, "children", "heirs of the body," "heirs" and "issue", and he has not made a slip in the use of any one of them. From first to last I can find no direction inconsistent with the regular course of an estate tail. It was said that though the draftsman was a lawyer he was a very poor one, and that, as he had blundered in the devise to the trustees of his will, you could not place much reliance on his handiwork. There, again, I differ. It is quite true that he has made a mistake in the devise to the trustees giving a contingent estate in fee to the survivor. But that, I fancy, was not a very uncommon mistake at the time, and it is one of little or no practical importance : Co. Litt. 191 a, note 1. As far as these limitations go, I think the draftsman has shewn himself a very competent lawyer. When you can give effect to every word, attributing to each expression its proper legal signification, and the result, through perhaps unexpected or unusual, is not irrational or absurd, I do not think you ought to approach the construction of the will with the idea that the testator probably did not mean what he has said. "The good sense of all these cases," said Lord Thurlow (3), "is to believe that where persons have expressed themselves right they knew what they meant." If I may say so, I think that is a wholesome rule, and a rule we ought to adopt in construing the will now before us. The devise is to the heirs special, if more than one, as tenants in common. That, I think, is the very thing the testator meant. If more than one of his children left heirs special, the heirs in each line were to take in equal shares as tenants in common. To suppose that the words in

(1) 2 Bli. 1. (2) 6 H. L. C. 875.
(3) 1 Bro. C. C. 221.

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question were meant to apply in the case of there being only one child is, I think, to violate the "good sense" of the case. It is like building a wall for the pleasure of running your head against it.

Next comes a direction contained in a parenthesis. The testator directs his trustees to convey the fee simple in equal shares to the tenants in tail in possession in each line on marriage or at majority. That is a perfectly good direction. Being subsequent to the estate tail, and taking effect during its continuance, it is not too remote. The estate tail would not merge in the fee. It would be protected by the statute de donis. The heirs of the body would still claim per formam doni, though the ancestor by levying a fine might bar his issue, and acquire a base fee which would merge (1). But in any event the ulterior limitations would be superseded. That is a result which, as it seems to me, a prudent testator in the position of William Harris might well have had in contemplation. Why should the testator not have intended what he says? Why should you suppose he did not know what he meant? To construe the words "heirs and assigns" as meaning heirs of the body, or to reject them as inconsistent or repugnant, seems to me to be contrary to every sound rule of construction. A direction to trustees invested with the legal estate in a certain property bidding them convey and assure that property on the occurence of a certain event to a certain designated person, "his heirs and assigns", is a direction which requires some ingenuity to understand in any sense but one. Nor can I see that any difficulty is caused by the circumstance that the person to take has already an estate tail. The gift is not, nor was it, I think, intended to be, in defeasance of the estate tail. What the testator says in effect is this: "If one or more of my des-descendants being tenant in tail, or tenants in tail in possession, should marry or attain twenty-one, I cancel all ulterior limitations in favour of collaterals, and give him or them the fee simple expectant on the determination of the estate tail." Surely there is nothing unreasonable in that. It may be said it is an unusual direction. So it is; but that does not make it bad. And it is perfectly consistent with the words introducing the gift over at the end of this set of limitations. It may be said that the direction is not wanted, for a tenant in tail can acquire the fee. So he can. He could do so then; but there was some trouble in doing it, and a recovery could only be suffered in term time. In *Seale v. Barter* (2),

(1) 2 Rep. 61 a; 8 Rep. 74 b.
(2) [1801] 2 B. & P. 485.

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where there was a power to make a settlement so as to pass the fee, the same argument was used and failed. It was pointed out, among other things, that the power would enable a disposition to be made of the estate without going through the forms of a recovery. Here there is the additional circumstance that the fee is to be conveyed either on marriage or at majority. And I may observe in passing, that in the event of there being a tenant by the courtesy, his concurrence would be necessary if the tenant in tail wished to acquire the fee.

In the meantime, and until marriage or majority, there is a provision for maintenance. I do not think that any objection can be made to that provision. And then come the words introducing the ulterior limitations. The estate is to go over if the testator leaves no issue, or if such child or children as he should leave, and the issue of such child or children, should die before attaining twenty-one or marriage. Those words seem to me to fit in with the direction to convey the fee to the tenants in tail in possession, on marrying, or attaining twenty-one. On either of these events occurring, the ulterior limitations are displaced, so far as regards the property to which the direction applies. Of course, you must imply cross-remainders, and then the scheme of the will is complete, and the property must either come to one or more of the testator's descendants in absolute ownership, subject to the estate tail, or go over within a very limited period.

If the words "heirs of the body" are to have their proper meaning, the rule in *Shelleys case* (1) must apply, even though the testator had said in so many words that the heirs special were to take by purchase (Harg. Tracts, 562, and see Wilm., 403 ; 4 D. M. & G. 588). The result is that Mary Harris, the testator's only child, took an estate tail if the estate limited to her and the estate limited to her heirs special are both of the same quality. I think they are. The estate limited to the heirs special is an equitable estate. On the authority of *Harton* v. *Harton* (2), I think the estate limited to Mary Harris is equitable too. *Harton* v. *Harton* (2) is a very old case. It was decided in 1798. Possibly it might just as well have been decided the other way. But *Harton* v. *Harton* (2) has never been overruled, and as it has been, I believe, followed in practice, I see no reason for disturbing it now.

Mary Harris, who became Mrs. Hartley, disentailed. If the dis-

(1) 1 Rep. 93 b.
(2) 7 T. R. 652.

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entailing assurance was valid it barred the limitation or direction under which her son, on her death, would have taken the fee by purchase. There was a question as to her sanity at the time ; but fortunately for the respondents, as it seems to me, they have so far not succeeded in establishing her incapacity.

On this view there would be an end of the case, and the appeal would fail altogether except for one circumstance. It would appear that at the beginning of the argument in the Court of Appeal the appellant proposed to shew that if Mrs. Hartley acquired the fee she made a disposition of the property which, at any rate, would defeat the title of the respondents. It was not disputed that the appellant was in time to raise the point ; but the Court of Appeal very properly thought that the legal argument on the construction of the will ought to be disposed of first. It happened that when the judgment was given the constitution of the Court was not quite the same as it was at the hearing, and, through some misapprehension on the part of the Court, or perhaps on the part of counsel, the appellant was not afforded an opportunity of establishing the point which he desired to raise. I think he ought to have this opportunity now, and therefore I agree in the motion that has been proposed.

Lord Shand. My Lords, I am also of opinion that, on the questions which have been the subject of argument on the appeal, the judgment of the Court of Appeal should be affirmed. I shall not attempt to repeat what has been already so fully and clearly stated by your Lordships who have preceded me, as well as by the learned Judges in the Court of Appeal, and content myself with saying that, having given my best consideration to the argument and the authorities on questions with which I cannot claim to have been previously acquainted, for the reasons which have been given in this House and in the Court of Appeal I concur in thinking that the legal estate of the property in question remained throughout with the trustees of the testator William Harris, and that the estates conferred on the beneficiaries, i.e., on Mary Hartley and on the heirs called after her, were both equitable. The rule in *Shelley's case* (1), therefore, admitted of application. I am further of opinion that, having regard to the terms of the devise which took effect in favour of the testator's daughter and the heirs of her body, the rule in *Shelley's case* (1) did apply. It appears to me that the terms used, "heirs of the body and bodies of such child or

(1) 1 Rep. 93 b.

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children," were employed in their legal sense, and denote the whole descendants of the child or children in the ordinary course of succession, and I think the appellant's counsel failed to shew that there was anything in the later or other terms of the deed to justify a more limited interpretation, such as would make the devise one in favour of personæ designatæ or of a class only, and so take the devise out of the rule in *Shelley's case*. (1)

On the question of the alleged invalidity of the deed by the testator's daughter barring the estate tail, I agree in thinking that, having regard to what occurred as a preliminary to the execution of that deed, to the certificate of the commissioners as to the full age and competent understanding of the grantor as proved by affidavit, there was not counter evidence in the finding of the jury carrying back the unsoundness of mind of Mary Hartley till October 31, 1834, sufficient to establish that Mary Hartley was not of competent understanding to execute the deed.

I agree in thinking that, looking to the course which the proceedings have taken, an opportunity should still be given to the appellant under the conditions proposed to prove the existence of a valid will by Mary Harris as alleged, and I concur in approving of the proposed order, including what is suggested as to costs.

Lord Davey. My Lords, the primary question in this case is: What estate did Mary Hartley take under the will of her father, William Harris, in the lands in question? I will first dispose of one point raised on behalf of the appellant, namely, that the estate in terms limited to the child of the testator for his or her life was a legal estate, whereas the estate limited to the heirs of the body was an equitable estate, and therefore the rule in *Shelley's case* (1) was inapplicable so as to give the testator's child an estate tail. It is admitted that during the minorities of the testator's children the purposes of the will require that the trustees shall take the legal estate. It is also admitted that after the death of the children the trustees must take the legal estate in order to enable them to convey to the "heirs" of the children at twenty-one, and in the meantime to receive the rents, issues, and profits, and provide for the maintenance and education of "such heirs". But it is said that the words of gift to the children or child after attaining majority are such as to give them the legal estate during their lives. The words applicable, in the event which has happened, are: "If I have only one child, then to permit and suffer such one child to have, receive, and take the said rents, &c.,

(1) 1 Rep. 93 b.

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for her or his sole use and benefit for and during the term of her or his life." No doubt the words "permit and suffer" are sufficient to pass the legal estate; but it is not an absolute rule, and the words are not inconsistent with the legal estate remaining in the trustees, though they have no duties to perform. It is a convenient rule that where there are recurring occasions for the exercise of active duties by the trustees and no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would but for the recurring duties be construed as uses executed in the beneficiaries. This rule was first laid down in *Harton* v. *Harton* (1) and was recognised and acted upon in *Brown* v. *Whiteway* (2) and *Toller* v. *Atwood* (3), and, as the editors of Mr. Jarman's book observe, must now be considered as established. I do not feel disposed to advise your Lordships to differ from it. I think, therefore, that the estates, both of the children or child and of their heirs of the body, are equitable.

The more serious question is whether the rule in *Shelley's case* (4) is applicable to the terms of the devise, assuming that the devises are of the same quality. Vaugham Williams J., who tried the action, and the Court of Appeal, have held that the point is concluded by authority, and that Mary Hartley consequently took an estate tail. My Lords, I feel very strongly the importance of adhering to the rule that technical expressions and words of known legal import shall receive their ordinary legal meaning. The neglect of this rule, in my opinion, tends to increased uncertainty in the construction of instruments, and to multiply the difficulties of those who have to advise upon them, and therefore to foster litigation. Instead of interpreting the words of the instrument, the Court is too frequently invited to embark on a fruitless speculation as to the testator's intention. The testator may, no doubt, tell you that he uses any particular words in a sense of his own, or (as it has been said) makes his own dictionary; but he must do so in such a manner as to make it plain to the mind of the tribunal which has to construe the instrument, not only that the words are used in other than their ordinary legal signification, but also in what sense they are used.

In my opinion the rule in *Shelley's case* (4) is a rule of law and

(1) 7 T. R. 652.
(2) [1846] 8 Ha. 145.
(3) [1850] 15 Q. B. 951.
(4) 1 Rep. 93 b.

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not a mere rule of construction—i. e, one laid down for the purpose of giving effect to the testator's expressed or presumed intention. The rule is this: that wherever an estate for life is given to the ancestor or propositus, and a subsequent gift is made to take effect after his death, in such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs, or heirs male of the body, or issue shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary. Wherever, therefore, the Court comes to the conclusion that the gift over includes the whole line of heirs general or special, the rule at once applies, and an estate of inheritance is executed in the ancestor or tenant for life, even though the testator has expressly declared that the ancestor shall take for life and no longer, or has endeavoured to graft upon the words of gift to the heirs, or heirs of the body, additions, conditions, or limitations which are repugnant to an estate of inheritance, and such as the law cannot give effect to. The rule, I repeat, is not one of construction, and, indeed, usually overrides and defeats the expressed intention of the testator; but the question always remains, whether the language of the gift after the life estate properly construed is such as to embrace the whole line of heirs or heirs of the body or issue, and that question must be determined apart from the rule, according to the ordinary principles of construction, including those which I have already referred to.

The testator may conceivably shew by the context that he has used the words "heirs," or "heirs of the body," or "issue" in some limited or restricted sense of his own which is not the legal meaning of the words—e. g., he may have used the words in the sense of children, or as designating some individual person who would be heir of the body at the time of the death of the tenant for life, or at some other particular time. If the Court is judicially satisfied that the words are so used, I conceive that the premises for the application of the rule in *Shelley's Case* (1) are wanting, and the rule is for foreign to the case. Bnt I repeat, that in every case the words are to be interpreted in their legal sense as words of limitation, unless it be made plain to the mind of the Court that they are not so used, and in what sense they are used by the testator.

Turning to the will before us, I think, with deference to my

(1) 1 Rep. 93 b.

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noble and learned friend opposite, that although the draftsman was acquainted with legal phraseology he was not master of the language that he has used, or able to use it with accuracy. It is quite possible, therefore, that the legal meaning and effect of the words of the will will not carry out the testator's intention; but what we have to do is to construe the language.

I do not find it necessary to say what would be the proper construction of the devise to the testator's children if there had been more than one. It is certainly open to the contention that the gifts over after the death of such children to their heirs of the body did not take effect until the death of the survivor of them. The construction of gifts in a somewhat similar form to the present has been discussed in many cases before the Courts, the most recent of which is *In re Hutchinson's Trusts* (1) Kay J. in that case reviewed all the previous decisions, and came to the conclusion that he was bound on the balance of authority to hold that the gift over took effect in favour of the issue of each tenant for life on his own death without waiting for the death of the survivor. In this case it is not necessary to decide the point, because the testator has himself provided for the event which happened of there being only one child. The words are (reading them short): "If I have only one child, then to permit and suffer such one child to receive and take the said rents and profits for her or his sole use and benefit for her or his life." For the purpose of construction, this is precisely the same as if he had said "to my daughter Mary for her life." The next gift must, I think, be read reddendo singula singulis, and so read, it is as follows: "From and immediately after the death of such child (or of Mary) my trustees shall stand seised and be possessed of the hereditaments hereinbefore devised to them, in trust unto and to the use of the heirs of the body of such child (or of Mary), if more than one, to be equally divided between them, such hereditaments to be legally conveyed and assured unto such heirs of my child (or of Mary) as they shall severally and respectively attain the age of twenty-one years or be married, and to their several respective heirs and assigns for ever." I have assumed, as the construction most favourable to the appellants, that the words of division between the heirs apply to the heirs of the body of a single child; but they may be read distributively, as applying only to the heirs of the body of children if more than one, in which case no difficulty arises from them. The ultimate gift over is in these

(1) [1882] 21 Ch. D. 811.

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terms: "If I shall die leaving no child or children, or issue of any child or children, or if such child or children as I shall leave and the issue of such child or children shall die before he, she, or they shall attain the age of twenty-one years or be married." Notwithstanding the able argument of the appellant's counsel, it is not made clear to my mind that the words "heirs of the body" are used in any sense different from their ordinary legal meaning of a line of desent, or, if they were intended to be words of purchase, in what other sense the words are used. To hold otherwise would, I think, be frittering away the sound rule of construction which I have already referred to, and introduce fresh uncertainty and confusion into questions which are now settled by authority. It is plain that the direction that the heirs shall take as tenants in common (assuming that it applies to the heirs of a single child) is not sufficient. One need only mention *Jesson* v. *Wright* (1). Nor will the terms of the direction to the trustees to convey the legal estate, in my opinion, afford any sufficient reason for construing the words "heirs of the body" as words of purchase. The primary object of the direction is to prescribe the time at which the trustees are to denude themselves of the legal estate after the expiry of the period of maintenance, and I think it must be construed in favour of the beneficiaries under the previous gift, and not as a fresh gift, notwithstanding any inaccuracy in the expression. It has already been decided in many cases, the authority of which cannot be questioned that the addition of the words "heirs and assigns" after a gift to "heirs of the body," will not enable the Court to give other than the legal meaning to the words "heirs of the body," or preclude the application of the rule in *Shelley's Case* (2). The gift over to the testators collateral relatives it is true takes effect not by way of remainder, but as an executory limitation. It does not afford an argument in favour of an estate tail in Mary, but it is not inconsistent with it, and does not therefore afford any argument against the prima facie legal meaning of the words used. It is common ground that this executory devise did not take effect. Mary Hartley by name is made residuary devisee She was the testator's sole heiress-at-law, and as the law stood at the date of the testator's death she, of course, took, not a remainder by devise, but the reversion in fee after her own estate tail by descent. She was, therefore, in my opinion, equitable tenant in tail with a legal reversion to herself in fee.

(1) 2 Bli. 1. (2) 1 Rep. 93 b.

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Another construction has been suggested, namely, that Mary took an estate tail defeasible after her death in favour of the first heir of her body who attained twenty-one or married in fee. I think this construction too refined. It introduces a new class of heirs, and, in my opinion, gives a wrong effect to the direction to the trustees to convey, which is not limited as an executory limitation or clause of defeasance, but I think is intended only to give legal effect to the previous equitable devise, and to clothe the beneficiaries under it with the legal estate as soon as the active duties of the trustees had expired. Such a construction, however, would not make any difference in the result if a valid disentailing assurance was executed.

The present respondents, plaintiffs in the action, claimed, by their statement of claim, as heirs of William Harris, the testator, treating him as the last purchaser. According to the view of the Court of Appeal, Mary was the last purchaser; but, as it is admitted that the respondents are the heirs of Mary as well as the testator, I do not think that the judgment should be set aside on that ground only. It is, however, suggested, though not proved, that Mary made a will which excluded the respondents altogether, and if that had been proved at the trial the judgment should have been for the appellants, although they may derive no title under the will. The question turns, in the first instance, on the validity of the disentailing assurance of February 28, 1835. Vaughan Williams J. held that it was proved that Mary was a lunatic at the date of this deed. This point was not left to the jury, but (I suppose by agreement) was decided by the learned judge after the trial. The only evidence against the deed was an inquisition taken in 1843, by which Mary was found to be of unsound mind, and it was also found that she had been in the same state of unsoundness of mind from October 31, 1834. On the other hand, the appellants did not offer any evidence except the disentailing deed itself, and the certificate of the commissioners for taking acknowledgement of deeds by married women. The certificate is in the form required by s. 84 of the Fines and Recoveries Abolition Act, and was, I presume, accompanied by the affidavit required by the rules then in force, which required the deponent to state (amongst other things) that the married woman was, at the time of making the acknowledgement, "of competent understanding." It was certainly prima facie evidence of Mary's soundness of mind on the date when she executed the deed; and I think, when the deed, being more than thirty years old, was produced from the proper custody and

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the certificate was put in, the burden of proof was thrown on the respondents to rebut it, and I do not think they do so merely by the production of the inquisition. It is not pretended that the inquisition was an estoppel, and it appears to me not to be in itself evidence of a very cogent character as to the date on which the lunacy commenced. It is not inconsistent even with Mary Hartley having sufficient possession of her faculties during a lucid interval to enable her to execute the deed. But the deed will not defeat the respondents unless it be proved that Mary executed a will or disposition which excluded them under the power thereby reserved to her.

It has not been argued that she had any other testamentary power at that date; and as her husband did not die until 1847, she could not dispose by will except under a power even of that reversion in fee which she took by descent. The appellants now allege that Mary Hartley made a will, but they did not put it in evidence at the trial, as they might have done. The Court of Appeal has held that it is too late for them to do so. In strictness, I do not think that the appellants, although they might have put it in, were bound to do so. The respondents, by their statement of claim, claim solely as the heirs of the testator, treating him as the last purchaser. In order to defeat that claim it was, strictly speaking, only necessary to prove that the testator was not the last purchaser, and it was not necessary to do more than shew that Mary acquired a title by purchase. On the evidence before them the Court of appeal have held that Mary was a purchaser: but it is admitted that the same evidence which proves their title as heirs of the testator will also prove them to be heirs of Mary. Strictly speaking, the respondents should amend their pleadings by stating, at any rate, an alternative claim as heirs of Mary, and I think they ought to be allowed to do so. But if so, it for the first time becomes neccessary for the appellants to shew that Mary dealt with the estate in such away as to exclude the respondents' title as her heirs. I think, therefore, the respondents should be at liberty to amend their statement of claim as suggested by my noble and learned friend on the Woolsack and I concur in the rest of the order proposed by him. * * * *

Judgment was then given in the cross appeal.

Lord Herschell (after stating the effect of the will and the words of the codicil.) My Lords, do these words revoke the gift of an estate in fee simple, and substitute the gift of an estate tail? They certainly do not in terms purport to do anything of the kind. Do

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they effect that result by implication? I think not. It is to be observed that it is expressly declared that the lands are to be held "upon the same trusts" as are in the will set forth. And one of these trusts was that W. H. Hartley should enjoy them in fee simple. The codicil purports to add a further special trust that it should not be lawful to cut off or destroy the entail. Under what impression the testator inserted this prohibition it is impossible to say. Perhaps he thought that an estate tail had been conferred. But had this been so, the attempt to restrict its alienation or conversion into a fee simple would have been wholly ineffectual. Perhaps he did not know what an "entail" meant. To imply the revocation of the gift of an estate in fee simple and the substitution of an estate tail merely because the testator having plainly made the former gift has, by a codicil, sought to annex a condition which would be wholly inoperative whether the estate devised be one in fee simple or in tail would, as it seems to me, be wholly unjustifiable. I do not think it necessary to add anything further to the reasons given by the learned Judges in the Court of Appeal. I think this appeal should be dismissed with costs.

Lord Watson. My Lords, I agree.

Lord Macnaghten. My Lords, I am of the same opinion. The case seems to me much too clear for argument. Under the testator's will William Henry Harris Hartley took the fee given to him after his mother's death in technical language admitting of no doubt. The testator indeed attempts to attach a condition about not letting part of the property which is plainly repugnant and void. Then comes a codicil made less than a year after the date of the will. It contains no misrecital. The testator evidently had the will before him; for he speaks of the will as being annexed to the codicil, and he copies from the will with strict accuracy the full description of the property devised. He does not express any wish to alter the terms of the devise. On the contrary, he gives the property to the trustees of the will "upon the same trusts," to quote the words of the codicil, "as are in my said will set forth." Then he attempts to attach to the estate he had created another absurd condition—a condition void if annexed to an estate tail, and meaningless if annexed to any other estate. But in framing the condition he speaks of "the entail" of his property. What does he mean by the word "entail" there? Nobody, I think, can tell. It is little use trying to guess. It is enough, I think, to repeat what Lord Redesdale said in *Jesson* v. *Wright* (1). "It cannot at this

(1) 2 Bli. 1, 56.

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day be argued," said his Lordship, perhaps rather too confidently, "that because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown." And if it is to be argued—for argument is not to be repressed merely because it is impossible—if it is to be argued that the testator did not mean to use the technical words in which the devise is expressed in their ordinary legal sense, because there is some other inconsistent word, I again venture to repeat what Lord Redesdale said: "It only follows that he was ignorant of the effect of the one or the other." All else I think is the merest guess work.

I agree that the appeal must be dismissed with costs.

Lord Shand. My Lords, I am of the same opinion.

Lord Davey. My Lords, Henry Harris by his will devised to trustees his lands in trust for Mary Hartley for life, and after her death upon trusts for the maintenance of William Henry Harris Hartley, her son, and such other children as should be living at her death, and if Mary Hartley should have only one child (which event happened), then to permit and suffer such child, after he or she should have attained the age of twenty-one years, and the heirs and assigns of such child, to have, receive, and take the rents, issues and profits of his said lands, to and for his, her, and their sole use and benefit from henceforth and for ever. There is, then, a gift over in the event of Mary Hartley's death without leaving any child, or her children not attaining twenty-one; but there is no gift over in default of issue of William Henry Harris Hartley, or in any similar event. The testator, in a subsequent part of his will, directed that such person as should from time to time be entitled to his lands aforesaid should, in no case or pretence whatever, let or demise the estates of Rosteage and Trovens, otherwise Trevons, but that the same were to be farmed and cultivated by such person in a farmer-like manner, and to commit no wilful waste, either by the cutting down of trees or in any other respect whatsoever.

It is not disputed that by the will an estate in fee simple in remainder was devised to William Henry Harris Hartley, or that the proviso against alienation was repugnant and void.

By his codicil the testator, after reciting that by his will he had devised to trustees his freehold hereditaments upon certain trusts therein set forth, devised the estates, and hereditaments to the same trustees upon the trusts set forth in his will. But, nevertheless,

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upon this further special trust, that it should not be lawful for the said William Henry Harris Hartley during his life to suffer any recovery or recoveries, or enter into any deed, matter, or thing whatsoever, whereby to cut off, dock, or destroy the entail of his said freehold lands, &c.

It is argued that the effect of the codicil is to cut down William's estate to an estate tail. I think that the words of the will must be held to be repeated and written afresh in the codicil. The argument must therefore be that, by reason of the prohibition against William destroying the entail, the previous word "heirs" must be construed as "heirs of the body." No doubt a gift to "A" and his "heirs" has been so construed, where there has been a gift over in case "A" shall die without heirs of his body or without issue, or even on failure of heirs, if the gift over be to a person in the line of heritable descent But in these cases the gift over cannot have effect given to it except by way of remainder, or unless the previous devise is of an estate tail only, and the word, "heirs" is therefore construed in a restricted sense by necessary implication. But no case was cited at the Bar in the least degree resembling the case before the House, and I have not been successful in finding any case where the word "heirs" is restricted to "heirs of the body" except by such necessary implication as I have referred to. We must, therefore, apply the well-known and sound principle that clear and unambiguous words of gift are not to be cut down or qualified by an ambiguous proviso. Vaughan Williams J. thought that the testator acted on the assumption that he had created an estate tail. It would, in my opinion, be more accurate to say that the testator assumed he had created something which he called an "entail." But what he meant by it I do not know, and decline to speculate. He may have thought that the estate created by his will, with the restrictions which he attempted to impose on alienation and enjoyment, was an entail, or he may not have had any clear idea as to the meaning of a recovery or an entail, as he certainly had not as to the effect or incedents of a gift to a man and his heirs. I content myself with saying that I cannot find in this blundering proviso any sufficient grounds to induce your Lordships to give any but their ordinary legal meaning to the gift to William Henry Hartley, his heirs and assigns. It is further to be observed that if Mary Hartley had had more children than one the effect of the appellants' construction would be to give different estates to William Henry Harris Hartley and the other children.

It was, however, suggested in the course of the arguments

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before your Lordships, that William Henry Harris Hartley could not take as purchaser because on the death of Mary, which happened after the passing of the Inheritance Act, he would have become entitled as heir of the testator to the same estate as was devised to him. It would be a strange result if this were so, for it is only by reason of the rule applicable to wills dated before the Act that his title by descent would be preferred to that by devise, and yet under the law as it then existed he could not be in by inheritance from the testator, as the descent would be traced from Mary, the person last seised; so that the point could never have arisen. The real answer, I think, is that he was not the heir at the death of the testator, and took under the will by purchase a vested remainder in fee after Mary's death liable to be divested pro tanto in favour of after-born children living at Mary's death. There is no authority for saying that, if once a man acquires an estate by purchase as devisee, that estate is divested in favour of one by descent if he afterwards becomes the testator's heir-at-law, unless *Clarke* v. *Smith* (1) be such authority. The facts are not stated in the same way in the different reports, and it does not appear from any of them that this point was adverted to either in argument or judgment, and I decline to treat it as an authority upon the point binding this House. I also think that the old rule ought not to be applied to a new case which only arises in consequence of the alteration in the law of inheritance made by the statute.

Order appealed from affirmed and appeal dismissed with costs.

NOTE.

This decision of the House of Lords affirms the doctrine that the Rule in *Shelley's Case* [(1581) 1 Coke, 93] is not a rule of interpretation but a rule of law. The rule itself may be stated thus: "Where an estate of freehold is limited to a person, and by the same assurance, an estate of the same nature, legal or equitable, is limited, mediately or immediately, to his 'heirs' in fee or tail, the word 'heirs' is a word of limitation, not of purchase, that is, the estate in fee simple or fee tail is vested in the person to whose heirs it is limited." As the rule is one of law, it will be applied notwithstanding any direction to the contrary. (*Jesson* v. *Wright*, 2 Bligh. 1.) The elaborate opinion of Lord Macnaghten in the leading case deals fully with the origin, history and scope of the Rule in *Shelley's Case*; for further comments, reference may be made to Tudor's Leading Cases on Real Property, 4th Ed. pp. 338, 360. See also *Antao* v. *Ardeshir*, 1 Bom. L. R. 303, and *Mithibai* v. *Limji*, I. L. R. 5 Bom. 506, upon the question of the applicability of the Rule in *Shelley's case* in this country.

(1) [1699] Com. 72 : 1 Salk. 241 ; 1 Lutw. 798.

LONDON AND SOUTH WESTERN RAILWAY COMPANY

v.

GOMM.

[*Reported in L. R., 20 Ch. D., 562.*]

THE FOLLOWING JUDGMENTS WERE DELIVERED:

1882.

March, 6.

Jessel, M. R.—This is an appeal from a decision of Mr. Justice Kay, and it raises two points: *first*, whether an option of re-purchase given to the London and South Western Railway Company by a deed of sale entered into between the Company and one Powell, the predecessor in title of the defendant Gomm, is obnoxious to the rule against remoteness; and *secondly*, whether the deed itself is or is not void, having regard to the 127th section of the Lands Clauses Consolidation Act, 1845.

The deed was made in 1865 after the compulsory powers of the railway company had expired, and it recited that the Company was seised of the land which was no longer required for the purposes of their railway and had contracted to sell it to Powell, who was the adjoining owner, at the sum of £100, subject to the condition thereinafter contained. The company then conveyed the land to Powell in fee for £100, and the deed contained this covenant by Powell:—[His Lordship read the covenant giving the option of repurchase to the Company: "And Powell thereby, for himself, his heirs, executors, administrators, and assigns, covenanted with the plaintiffs, their successors and assigns, that he, the said G. Powell, his heirs, and assigns, owner and owners for the time being of the hereditaments intended to be thereby conveyed, and all other persons who should or might be interested therein, should and would at any time thereafter (whenever the said land might be required for the railway or works of the company) whenever there unto requested by the company, their successors or assigns, by a six calendar months' previous notice in writing, to be left as therein mentioned, and upon receiving from the company, their successors or assigns, the said sum of £100 without interest, make and execute to the company, their successors and assigns, at the expense of the company, a reconveyance of the said hereditaments free from any incumbrances created by the said G. Powell, his heirs or assigns, or any persons claiming under or in trust for him or them."]

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Now that is unlimited in point of time, and it does not appear to me to be possible to insert a limit of time, because to put in the words "within a reasonable time," or any other words limiting the time, would be exactly contrary to the intention of the parties. It is not only unlimited in point of time but it is obviously intended so to be. The railway company do not want the land now, and they do not know that they ever will want it, but their bargain is that whenever it may be required for the works of the company the owners or owner for the time being of the land are or is to convey to the company. The very essence of the contract is that it shall be indefinite in point of time. You cannot, as in *Kemp* v. *South Eastern Railway Company* (1), insert by intendment the limitation that the land is to be taken before the time for executing the works had expired, for in this case the time for the execution of the works had already expired. It appears to me therefore plain (and indeed it was admitted in argument by the respondents) that the option is unlimited in point of time.

If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being

(1) L. R., 7 Ch., 364.

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vested in another, the covenant giving the option must give that other an interest in the land.

It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognised exceptions, such as charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period.

It was suggested that the rule has no application to any case of contract, but in my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift or contract can make no difference. The question is, what is the nature of the interest intended to be created? I do not know that I can do better than read the two passages cited in argument from Mr. Lewis's well known book on Perpetuities at page 164. He cites with approbation this passage from Mr. Sanders' Essay on Uses and Trusts: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity." Then Mr. Lewis adds these words: "In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation."

Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to A in fee, with a proviso that whenever a notice in writing is sent and £100 paid by B or his heirs to A or his heirs the estate shall vest in B and his heirs, and a contract that whenever such notice is given and such payment made by B or his heirs to A or his heirs, A shall convey to B and his heirs? It seems to me that in a Court

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of Equity it is impossible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me to be plain that the rules as to remoteness apply to one case as much as to the other.

That appears to me to dispose of the case, unless we agree with the conclusion of Mr. Justice Kay on the last point considered by him. Down to that point I agree with him. I consider that he is quite right in the view he takes of the doctrine of remoteness and of the authorities cited before him, not forgetting the case of the *Birmingham Canal Company* v. *Cartwright* (1), which must be treated as overruled. But Mr Justice Kay, having, as I think he has, most correctly and accurately defined the law, thinks that this case is not within it, because he comes to the conclusion that "this covenant does not create any interest in the land." But he had forgotten that if that were so he could not make a decree against Mr. Gomm. If it were a mere contract it was not Gomm's contract, and if it did not in equity run with the land so as to give an interest in the land, it could not have been enforced against him. It is clear from his Lordship's judgment that if he had been of opinion that this covenant gave the company an interest in the land (which, I think, is the correct view) he would have decided the case the other way.

With regard to the argument founded on *Tulk* v. *Moxhay* (2), that case was very much considered by the Court of Appeal at Westminster in *Haywood* v. *The Brunswick Permanent Benefit Building Society* (3), and the Court there decided that they would not extend the doctrine of *Tulk* v. *Moxhay* (2), to affirmative covenants, compelling a man to lay out money or do any other act of what I may call an active character, but that it was to be confined to restrictive covenants. Of course that authority would be binding upon us if we did not agree to it, but I most cordially accede to it. I think that we ought not to extend the doctrine of *Tulk* v. *Moxhay* (2) in the way suggested here. The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's case* (4) to another line of cases, or else an extension in equity of the doctrine of

(1) L. R., 11 Ch. D., 421
(2) 2 Ph., 774
(3) 8 Q. B. D., 403.
(4) 5 Co. Rep. 16 a.

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negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk* v. *Moxhay* (1) was affirmative in its terms, but was held by the Court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine establishing an exception to the rules of Common Law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not. It appears to me that, rightly considered, that doctrine is not an authority for the proposition that an equitable estate or interest may be raised at any time, notwithstanding the rule against remoteness. It is, if I may say so, another exception to the rules against remoteness, exceptions which had previously been thoroughly established in many cases at law as regards easements, and in equity as regards charities. That being so, it does not appear to me that *Tulk* v. *Moxhay* (1) has any direct bearing on the case which we have to decide.

There is another important point which alone would enable us to decide this case in favour of the appellant. Was the conveyance of 1865 *ultra vires*? When we look at the provisions of the Lands Clauses Consolidation Act, s. 127 *et seq.*, I think we must consider them to mean that at the expiration of the statutory period, if the land is then superfluous, that is, if it is not wanted for the purpose of the railway, the company must sell it under the penalty of losing it by its revesting in the adjoining owner. There is no doubt that the company can before the expiration of the statutory period, determine that the land is superfluous and sell it, and it is

(1) 2 Ph., 774.

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equally clear that if at the end of the statutory period they think that the land may be required for the purpose of their railway it is not then superfluous. When I say "they think," I mean if their proper advisers have fairly and reasonably come to that conclusion, that is sufficient. So that the fact of its being superfluous may be determined beforehand by the action of the company, or it may be delayed after the expiration of the statutory period without the land being actually used, but whenever it is determined, either before or after the expiration of that period, that the land is superfluous, it becomes saleable or vests in the adjoining owner.

That being so, it is plain that when land is sold as superfluous, no interest in it can be retained by the company. Now if I am right in the conclusion at which I have arrived as to the nature of this option of repurchase an interest was retained by the company. The form of the conveyance is plain. It recites a contract for sale subject to the condition hereinafter mentioned. That is not an absolute sale but a conditional sale. Now the statute in terms requires an absolute sale, and that being so, the company could not sell, reserving an option of repurchase. The sale itself therefore was beyond their power, and was a void sale, and we must recollect that this is a statute which governs the legal estate as much as the equitable estate. Then what follows? The land if superfluous revested in Mr. Powell under Sect. 127 at the end of the ten years, free from any restriction, which would give him a title; but if it was not superfluous, then as the statutory period of limitation had elapsed before the commencement of this action, the appellant would have obtained a title under the Statute of Limitations. In either case, therefore, the appellant's title must be valid as against the title of the company.

On these grounds it seems to me that the present appeal ought to be allowed.

Sir James Hannen.—The first question in this case is as to the effect of the deed of the 10th of August, 1865.

It appears to me that the company are stopped from denying that this land was superfluous land at the time of the sale to Powell. It is expressly recited that the land is no longer required, and that they thereupon propose to sell it at a particular price

It is perfectly plain that the company has only the right to sell subject to the terms imposed by the legislature in the

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Lands Clauses Consolidation Act. That Act requires the company to sell absolutely, and looking to the history of legislation on this subject I think there is no doubt that particular stress was laid upon the word "absolutely." It was inserted, in my opinion, in order to prevent the company having acquired lands which it was found afterwards were not required for the purpose of the undertaking, from still retaining indirectly a hold upon those lands. It appears to me, therefore, that as this was not an absolute sale, but a conditional sale, it was void, and that the effect would be that at the end of the ten years, there being no sale, the land would vest in Powell. At the same time I do not think that every contract made by a railway company for the purpose of settling at the present time what should be the price of land to be acquired by them at some future time would be bad in itself. I think that if there had been a separate contract limited to the time within which the company would have authority to take lands, there would not have been anything illegal in their entering into an arrangement with the owner that they should have a right to purchase at a particular price to save the trouble and inconvenience of having the value settled in some other manner, and *Kemp* v. *South Eastern Railway Company* (1) is an authority to that effect.

The next question is: Does this covenant create an interest or estate in the property at law, or in equity. Upon that point I have nothing to add to what has been said by the Master of the Rolls. It is not a subject with which I have been frequently called upon to deal, and therefore, any opinion that I may express on the subject has not the value it would have if it came from one of my learned colleagues, but I must say that it appears to me to be a startling proposition that the power to require a conveyance of land at a future time does not create any interest in that land. If it does create such an interest, then it appears to me to be perfectly clear that the covenant in this case violates the rule against perpetuity, because, taking the passage which has been cited from Sanders, "a perpetuity may be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined." Now this covenant plainly would

(1) L. R., 7 Ch., 364.

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restrain the future owner from aliening the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option.

The last question is, supposing this covenant does not create any estate or interest, what is the effect of it as a covenant? It is clear that it is not a covenant which would run with the land at law. *Spencer's case* (1) and the notes to it in Smith's Leading cases (2) seem to me to point very clearly to that conclusion. It has been said, however, and in fact the judgment with which we are dealing lays down, that although this is only a personal covenant, yet *Tulk* v. *Moxhay* (3) is an authority for the proposition that such a covenant if known to the purchaser of the estate binds him. This argument is disposed of by the decision of the Court of Appeal in *Haywood* v. *The Brunswick Permanent Benefit Building Society* (4) which seems to me to put a wholesome restriction upon the application of *Tulk* v. *Moxhay* (3) by laying down this rule, that it only applies to restrictive covenants, and does not apply to an affirmative covenant such as a covenant binding the owner of the land at some future time to convey it.

For these reasons I am of opinion that the judgment of the Court below cannot be supported, and that the appeal must be allowed.

Lindley, L. J.—I am of the same opinion. This is an action for specific performance of a contract entered into not by the defendant but by somebody else. The first thing, therefore, the plaintiffs must shew is, upon what legal principle the defendant is bound by a contract into which he did not enter.

It is not contended that he is bound by it on the ground that the covenant entered into by Powell runs with the land and binds him at law, but it is said that though it does not bind him at law it binds him in equity.

Then upon what principle is it that he is bound in equity? It is said that he is bound in equity because he bought the land knowing of the covenant into which his predecessor in title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants. That is precisely the proposition which had to be considered in

(1) 5 Co. Rep. 16 a.
(2) Vol. I. 8 Ed., p. 90.
(3) 2 Ph., 774.
(4) 3 Q. B. D., 403.

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Haywood Brunswick Permanent Benefit Building Society (1), and because it was sought there to extend the doctrine of *Tulk* v. *Moxhay* (2) to a degree which was thought dangerous, considerable pains were taken by the Court to point out the limits of that doctrine. In that case an owner in fee had granted a rent, and in order better to secure it, he covenanted for himself, his heirs and assigns, to build some houses on the land out of which the rent issued and to keep them in repair for ever. It was sought to enforce that convenant by bringing an action for damages against the mortgagee in possession of the land, because the houses had been allowed to get out of repair. It was of course seen that an action would not lie at law; but it was contended, on the authority of *Tulk* v. *Moxhay* (2), that inasmuch as the defendants took the land with notice of the covenants they were bound by them in equity. The Court of Appeal declined so to extend the doctrine of *Tulk* v. *Moxhay* (2), and their reasons will be found very carefully stated by Lord Justice Cotton in his judgment. The conclusion arrived at by the Court was that *Tulk* v. *Moxhay* (2), when properly understood, did not apply to any but restrictive covenants. The case of *Cooke* v. *Chilcott* (3) before Vice-Chancellor Malins was very much considered, but it was not followed by the Court of Appeal. Here we are asked to extend the doctrine of *Tulk* v. *Moxhay* (2), and to apply it to a covenant to sell land at any time for a specified sum of money. That this is an extension of the doctrine cannot, I think, be denied; and for the reasons which were given by the Court of Appeal in the case to which I have referred I think we ought to decline to extend that doctrine. If so, how is Gomm to be held to be bound by this covenant? He did not enter into it, he is not bound at law, and *Tulk* v. *Moxhay* (2) is no authority for saying that he is bound in equity. That appears to me to dispose of this case.

I agree with the observations made by the other members of the Court, that this covenant creates an interest in land, and is void for remoteness. On the question of remoteness one view was taken by Mr. Justice Kay in this case, and the other view by Mr. Justice Fry in *Birmingham Canal Company* v. *Cartwright* (4). My own view is that the observations made by Mr. Justice Kay on that case and on *Gilbertson* v. *Richards* (5) are sound. The error in his

(1) 8 Q. B. D., 403.
(2) 2 Ph., 774.
(3) L. R., 3 Ch. D., 694.
(4) L. R., 11 Ch. D., 421.
(5) 4 H. & N., 277; 5 H. & N., 453.

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judgment appears to me to be, that he has applied *Tulk* v. *Moxhay* (1) to this case without sufficiently considering the extent to which he was carrying it.

As regards the observations upon Sect. 127 of the Lands Clauses Consolidation Act, I also concur with the other members of the Court. It appears to me that inasmuch as the company could only sell by virtue of that section which requires an absolute sale, and as the sale which they made was not an absolute sale within the true meaning of that clause, the logical consequence is that the whole transaction is void, and on this ground, if there had been no other, the Court must have declined specifically to perform the contract.

I am therefore of opinion that the appeal must be allowed, and judgment must be for the defendant.

Mr. Davey asked that the costs of the short-hand notes of Mr. Justice Kay's judgment might be allowed.

Jessel, M.R.—We have not used them, but have read Mr. Justice Kay's judgment in the Law Journal. If that report had appeared a sufficient length of time before your brief was delivered, we should not have allowed the costs of a shorthand note; but as it was published so late as the 3rd of March, we think the costs ought to be allowed.

NOTE.

This decision may be treated as an authority for more than one important proposition on the law of perpetuities:

(i) An executory interest in property, (in this particular case, a covenant to resell land upon request at any future time), to arise on a future event which may not happen within the period prescribed by the Rule against Perpetuities, is void.

(ii) The Rule against Perpetuities does not apply to a mere personal contract.

(iii) The Rule against Perpetuities does not apply to a covenant for the perpetual renewal of a lease for lives.

As regards the first, point, it will be observed that the Court of Appeal agreed with the Original Court upon the question of principle; the only difference was as to whether a covenant to resell land was a merely personal covenant, or created an executory interest in property; the Court of Appeal took the latter view. A similar view has been generally adopted in this

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country. See the judgment of Markby-J. in *Tripoora* v. *Juggernath*, 24. W. R. 321, approved in *Nobin* v. *Nabab Ali*, 5 C.W.N. 343, though the opposite view had been taken in *Hares* v. *Joharuddi*, 2. C. W. N. 575; See also *Ramasami* v. *Chinnon*, I. L. R. 24 Mad 449, and *Chundi* v. *Siddheswari*, L. R. 15. I. A. 149. See the subject discussed in Mukhopadhya, on Perpetuities (Tagore Law Lectures 1893), pp. 127-135, and p. 269.

As to the second point, reference may be made to *Walsh* v. *Secretary of Estate*, 10. H. L. C. 367, and *Bosland* v. *Steel*, (1901) 1. ch. 279.; it follows that the rule against remoteness does not apply to a covenant restrictive of the use of land. (*Mackenzie* v. *Childers*, 43. Ch. D. 265).

As to the third point, see *Hare* v. *Burges*, 4 Kay and Johnson, 45; *Pollock* v. *Beath*, 9. I. R. Eq. 229, 607, and *Rediugton* v. *Browne*, 32. L. R. Ir. 347.

(1) 2 Ph., 774.

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[*Reported in 21 Ch. D., 9.*]

THE FOLLOWING JUDGMENTS WERE DELIVERED.

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Jessel M. R.—It is not necessary on the present occasion to decide finally what the rights of the parties are. If the Court sees that there is a fair question to be decided it will take security so that the party who ultimately succeeds may be in the right position. The question is one of some nicety. There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate, at common law, by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, "I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry." That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed.

The next question is, how ought the lease to be drawn? And that is a question of some nicety. I do not wish now finally to decide it, and on an application of this kind it is not necessary to do so, but I think the Court is bound to say what its present opinion is, because that is material on the question of what ought to be done until the trial. The whole difficulty arises from a single clause. Instead of taking the trouble

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to state in detail what covenants the lease was to contain they have adopted this short form.

His Lordship read the clause which is given verbatim: ["The lease to be prepared by the solicitor to the lessor and approved by the solicitor to the lessee, and to contain such covenants, provisos, powers, and conditions as are usually inserted in leases of a similar nature, and particularly those inserted in a lease of the Newfield Mills, Darwen, dated the 1st of May instant, made between T. A. Aspden of the one part, and Robert Bradley of the other part, or such of them as can be made applicable to the tenancy hereby agreed to be created."]

When we look at the lease of the Newfield Mills we find that it is a lease at a rent certain payable beforehand, and the question is how far that provision can be made applicable to the present very peculiar agreement. That agreement provides that the lessor at his own expense is to find steam power for driving and running the machinery, and that the rent is to be £2. 10s. for every loom run, but for the first year the lessee is not to run less than 300, and afterwards not less than 540 looms. Then there is a proviso that the lessee is to have the right, whenever he shall think fit, to find the steam power for himself, and in that case his rent is to be 30s. per loom. There is a further proviso that until the lessee shall find the steam power the engine-house, boiler-house, mechanics' shop, stables, and yard adjoining thereto shall be excluded from the demise. As I read that it means that when the lessee once elects to provide his own steam power, the excepted particulars, are included in the demise, and then the lessor is no longer bound to find the steam power because he has demised the very thing that produces the steam power, and the lessee is now the lessee of the engine-house, and the rest, and has to find steam power for himself. The lessee has exercised the option to find his own steam power, and the result is that now he is only liable to pay 30s. per loom.

Now the lessee agrees to run not less than 540 looms, and the next question is, whether in drawing the lease a dead or minimum rent ought to be reserved for 540 looms, or is it to be left on covenant. My present opinion is that there ought to be a dead rent. There is no longer any obligation on the lessor to find the steam power; and it appears to me, therefore, that it would be a right thing to reserve in the lease a dead rent of £810, being at the rate

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of 30 s. a loom for 540 looms. If that is so, the stipulation as to paying rent beforehand can apply to that £810 a year, and the covenants and provisions in the lease of the Newfield Mills, Darwen, could be made applicable to this minimum rent. Therefore, it is my present opinion, though I do not give it as a final opinion, that the rent is payable beforehand to the extent of £810.

The result, therefore, will be to vary the order of the Court below by making the sum to be paid into Court £810 instead of £1005. 14s. The plaintiff will pay the costs of the appeal.

Cotton, L. J.—I am of the same opinion. The question as to whether the defendant was right in putting in this distress must depend upon questions which have to be decided at the hearing of the cause, and the only question we have now to consider is what is right to be done between the parties for the purpose of keeping things *in statu quo*, and preserving their rights until the questions between them can be decided.

This landlord has put in a distress. He is right if the lease under which the tenant must be taken to be holding this land or premises would give him rent beforehand. This is not the time for finally deciding whether he is entitled to any and to what rent payable beforehand, but the question before us is whether we are now at once to deprive the landlord of any security which he has in his hands for the payment of his rent? In my opinion we ought not. Of course, before allowing the landlord to retain the security given by the distress we must be satisfied that there is a *prima facie* case in his favour, and in my opinion there is. It would be wrong for us absolutely to decide now how this lease should be framed, for there are many matters which would require consideration, one clause may depend on another, and the question how one clause is to be dealt with may affect the other provisions in the lease. But it is my present opinion that there ought to be reserved as dead-rent a rent which will correspond to the minimum number of looms which the plaintiff is to run in any particular year, and after the first year it is to be always 540.

If, then, there is to be a dead rent, the provision in the lease of the 1st of May that the rent thereby reserved shall be beforehand rent can be made applicable to the present tenancy by making it apply to the dead or fixed rent of £810 a year,

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leaving the payment of the remaining sum, if any, which is to be paid by the tenant to be enforced by the landlord under the covenants when it is ascertained how many looms the tenant has run.

In my opinion, therefore, there is at least such a *prima facie* case in favour of the defendant that we ought not to deprive him of the security which the distress gives him without the plaintiff paying into Court that which will be a sufficient security for the defendant if he is right in his contention, reducing the amount to £ 810 as the Master of the Rolls has already said.

Lindley L. J.—I also think that the rights of the parties in this case turn upon the lease as it ought to be framed in persuance of the contract into which these parties have entered. I do not agree with the contention of Mr. Cozens-Hardy and Mr. Collins that, according to the true construction of the agreement, the whole of the rent would defend simply upon covenant, and be an unascertained sum till the end of the year; in other words I think, as at present advised, that the lease should be so worded that there would be a minimum rent reserved. If so the provisions in the lease of the 1st of May which relate to the payment of rent in advance and the power of distress accordingly would be let in so far as regards the minimum rent. I think Mr. Justice Fry has inserted too large a sum in his order, because he has treated the whole rent as payable in advance. I do not think that correct; but to the extent of the minimum rent, which comes to £810 it appears to me we ought not to compel the landlord to withdraw unless on the terms of the tenant paying that money into Court and of course the proper form of lease will be settled hereafter if the action goes on in the regular course.

NOTE.

This decision affirms the principle that a tenant holding under an agreement for a lease, of which specific performance would be decreed, stands as between himself and his landlord in the same position as if the lease had been executed. This principle has been applied to a case in this country; See *Jaeahir* vs. *Chatterput*, 2. C. L. J. 343, where the later English decisions on the subject will be found reviewed. By way of analogy, reference may be made to cases which deal with the position of a purchaser between the date of contract and completion; it has been held that he is entitled to maintain an action for damages, and also to claim the benefit of restrictive covenants attached to

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the land; see *Clarke* vs. *Ramar*, (1891) 2. Q. B. 456, and, *Birmingham* v. *Allday* (1893) 1. Ch. 342.—Reference should also be made to the judgment of Farwell J. in *Manchester* v. *Coombs* (1901) 2. Ch. 608, where the reason for the rule is explained, and it is pointed out that the doctrine is applicable only in those cases where specific performance can be obtained between the same parties, in the same Court, and at the same time as the subsequent legal question falls to be determined, for the position of an auction purchaser in this country before confirmation of sale, see *Bhowani* vs. *Mathura*, 7. C.L. J. 1., where it is pointed out that although an auction purchaser does not acquire a full title till the confirmation of the sale, yet upon general principles, he may have equitable rights arising out of his purchase before the date of confirmation of the sale.

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[*Reported in I. L. R., 23 Calc., 1.*]

THEIR LORDSHIP'S JUDGMENT WAS DELIVERED BY

1895. July, 20.

Lord Watson.—The late Chaudhuri Karim Baksh was owner of one-half share of the *taluk* Panchgahni, in the district of Barabanki which was duly entered in lists 1 and 3 prepared under the Oudh Act I. of 1869, and was therefore descendible, in the event of his dying intestate, according to the rule of primogeniture. He had three sons, the eldest, Ibad Ali, by his first wife, being the respondent, and the younger sons, Sajid Ali and Wajid Ali, by his second wife, being the appellants in the original and only appeal which has been insisted in at their Lordships' bar.

The deceased had a paralytic attack about the year 1879, by which he was affected until his death, which occured on the 16th October, 1883. In the year 1882 the deceased became dissatisfied with the conduct of the respondent, Ibad Ali, to whom he had previously entrusted, for a period of twenty years, the entire management of his property. On the 24th March, 1882, he executed a will by which he settled his estates upon his three sons in equal shares; and on the 27th May, 1882, he applied for mutation of names in their favour. That application was resisted by the respondent, on the ground that his father had become unable to manage own affairs, and was "a perfect insane." It was ultimately withdrawn, in consequence of the deceased having executed a second will on the 25th September, 1882, by which he appointed his two younger sons to succeed him as *talukdars*, having the sole management and administration, and restricted the interest of the respondent to one-third of the free profits during his life-time.

From the time when the respondent was deprived of the management he appears to have lived on terms of open enmity with his father until the death of the latter. After the execution of his second will, the deceased on the 7th November, 1882, obtained an order from the Assistant Commissioner, which was subsequently confirmed by the Commissioner on an appeal by the respondent, to the effect that the possession of the deceased was to be maintained until removed by a Court of competent jurisdiction. All the parties, including the respondent, were by the same order, bound

* *Present*:—Lords Watson and Morris, and Sir R. Couch.

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over to keep the peace. The respondent, notwithstanding, forcibly interfered with his father's estate and its management; and on the 23rd December, 1882, upon a complaint at the instance of the deceased, which was supported by the testimony of the deceased given in open Court, he was convicted of breach of the peace, and sentenced to pay a fine of Rs. 200. In April and May, 1883, similar proceedings were taken against the respondent, when the deceased again appeared in Court, on the 5th May, 1883, and gave his deposition upon oath.

On the 29th June, 1883, the respondent presented a petition to the Deputy Commissioner of Barabanki, praying him to place the estate of the deceased under the management of the Court of Wards. The reasons assigned for the application were, that the deceased was a man of 70, that he had been paralysed for three or four years, and that he had "consequently become weak and imbecile, quite unable to manage the affairs of the estate. He has no discretion of either good or bad, and has lost his powers of moving and seeing, and is a perfect insane." The Deputy Commissioner made a remit to his Assistant for enquiry into the condition of the deceased. The Extra Assistant Commissioner summoned Karim Baksh before him, and after an examination on various matters connected with the estate and family of the decease, he reported, on the 30th August, 1883: "Chaudhuri Karim Baksh certainly had an attack of paralysis, and in consequence thereof he has lost his strength of his leg to some extent, but he is not out of his senses, nor he is of unsound mind. He has answered the questions put to him very thoughtfully." Upon receiving that report the Deputy Commissioner declined to entertain the respondent's petition.

On the 10th of July, 1883, ten days after the date of the respondent's application to have his estate placed under the guardianship of the Court of Wards, the deceased executed a third will. By it, he appointed that his second son, Sajid Ali, should succeed him as sole *talukdar*; that his third son, Wajid Ali, should be entitled to a moiety of the profits remaining after payment of the Government revenue and other necessary expenses; and that the respondent, Ibad Ali, should get Rs. 30 per mensem as maintenance allowance from Sajid Ali, subject to certain conditions which it is not material to notice. The instrument sets forth that the object of the testator was to prevent disputes arising after his death, and that "Ibad Ali, my eldest son, has, by his refractoriness and wickedness, caused such disturbances that all hopes formerly entertained have vanished."

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The appellant, Sajid Ali, having been admitted to possession of the estate as *talukdar* appointed by the preceding will, the present suit was brought by the respondent in the Court of the District Judge of Lucknow, on the 9th April 1887. His plaint makes no mention of the wills of March and September, 1882; but it impeaches the validity of the will of the 10th July, 1883, on three separate grounds, the first being that the document was faudulently obtained by the appellants through undue influence and coercion; the second that, at the date when it bears to have executed, the deceased was of weak intellect, had lost his senses, and was unable to distinguish between right and wrong; and the third that it was contrary to Mahomedan law, and to Act I of 1869. The prayer of the plaint is that possession be given to the respondent of the whole immoveable, and also of certain moveable, property of the deceased of the estimated value of Rs. 2,000 with mesne profits. In their written statement, the appellants simply traversed the allegations and pleas contained in the plaint.

The case went to trial before the District Judge upon four issues, the first being: "Is the will executed by Chaudhuri Karim Baksh void as having been executed owing to undue influence and coercion on the part of defendants, and owing to Karim Baksh being at the time not of sound disposing mind?" The learned Judge negatived the issue, and, in giving judgment for the appellants, expressed an opinion that, inasmuch as the date of its institution more than three years had elapsed since the time when the respondent became aware of the provisions of the will, the suit was barred by Act XV of 1877, Schedule II, Article 91.

On appeal, the Judicial Commissioner reversed the decision of the District Judge, and gave the respondent a decree for the one-third share of profits which had been bequeathed to him by the second will of the 25th September, 1882, with mesne profits from the time of the testator's death. The learned Judicial Commissioner came to the conclusion that, on the 20th July, 1883, the deceased was incapable of making a valid testament.

Upon the hearing of this appeal appellants' Counsels were, in the opinion of their Lordships, well advised in not pressing the plea in bar of action which was suggested for the first time by the District Judge. Article 91 of Schedule II of the Limitation Act of 1877 does not appear to their Lordships to have any application to the case of a will. On the other hand, the respondent did not open or insist on his cross appeal, which was brought for the purpose of raising the question whether the deceased was precluded from disposing of his estate by

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will, in prejudice of his heir-at-law, either by Mahomadan law or by Act I of 1869. Both Courts below have concurred in finding, as matter of fact, that the testator was of sound disposing mind at the time when he executed his first and second wills ; and they also concurred in holding that the will of the 10th July 1883 was not procured by undue influence or coercion. In these circumstances, the arguments of Counsel were exclusively directed to the question whether the deceased Karim Baksh was or was not possessed of sufficient testimentary capacity at the time when he executed his third will.

It is hardly necessary to observe that a permanent paralytic affection, whilst it must to some extent diminish the physical energy of the sufferer, does not necessarily impair his mental powers to such an extent as to render him incapable of transacting business or of executing a will. Even in cases where the mental faculties of the person affected have been greatly enfeebled by physical weakness, he may still be capable of devising and intelligently executing a will of a simple character, although unfit to originate or to comprehend all the details of a complicated settlement. Nothing can be more simple than the changes which were made, by the will impeached upon the terms of the second will which it was intended to supersede. In so far as concerns the respondent, the alteration consisted in reducing his third of profits to a monthly allowance of Rs. 30. Upon the assumption that the testator understood what he was doing, it cannot be said that the will of July 1883 was either unnatural or unreasonable. Besides violently interfering with the estate, the respondent had been and was then persistently endeavouring to brand his father with the stamp of insanity, with the view of depriving him of the management of the estate during his life, and of the power of regulating his succession after his death.

Their Lordships have already adverted to the fact that, in the beginning of May 1883, the deceased gave evidence in Court ; and that towards the end of August he was able to attend the Extra Assistant Commissioner's Court, and to give intelligent replies to the questions addressed to him by that official. It is obvious that, between these dates, the deceased must have suffered and must have recovered from a serious attack, if, as the respondent maintains, and the Judicial Commissioner has held, he was incapable of making a will on the 10th July. But no such access of illness and subsequent recovery during that period of three months and a half is spoken to by any of the witnesses on either side. On the contrary, most of the respondent's witnesses who speak most strongly to the mental incapacity of the deceased, assert that it existed continuosly from

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and after the time of his first attack in 1879. But their evidence, when examined, comes to very little. They state that the deceased "could not distinguish between good and bad," and also that he was "not in his full senses." The only reason which they assign for his inability to distingnish between good and bad was, that he was frequently in a passion, and used abusive, and, occasionally, obscene language. That the deceased was not in his 'full senses" is in one sense perfectly true. He was feeble in body; the vigour of his mind was impaired, and his utterance was defective; but there is nothing in the testimony of the respondent's witnesses, taking it by itself, which could reasonably lead to the inference that he was incapable of understanding such business as falls to the lot of a *talukdar*, or of regulating the succession to his property.

On the other hand, the evidence adduced in support of the will appears to their Lordships to negative conclusively any speculations which might be founded upon the testimony brought forward by the respondent. That the will was formally executed by the testator, in presence of the attesting witnesses, is clearly proved and was not disputed by the respondent's Counsel. On the 10th July, the day upon which it was executed, the Sub-Registrar attended at his house for the purpose of registering the will; and, in the course of these proceedings, the deceased twice signed his name, without assistance, in the presence of that official, who was examined as a witness for the appellants. In his deposition he says: "I saw him sign. He was in full possession of his senses..... ..... The deed was read and explained to him, and he said that he understood it. His hand did not shake. No person held his hand while he signed." The same witness added: "Karim was the first to tell me that a will was to be registered. I read out the deed, and gave an abstract of the contents" Then the evidence of the Extra Assistant Commissioner, to whom the respondent's petition of the 19th June was remitted for inquiry, shows that in August the deceased fully understood the terms of the will which he had made and its effect. He summoned the deceased, who came to his office on the 23rd August; and he says: "I put questions to him in such a way as to test his sanity; whatever questions were injurious to his interest he kept silence with reference to them, but answered all questions which were beneficial to him." As the report made at the time by this witness bears, the deceased, referring to the will of 10th July, informed him: "But now I altogether exclude Ibad Ali," and then

went on to explain, with perfect accuracy, the occurrences which had induced him to take that step.

Their Lordships think it proper to notice two statements made by the deceased in his deposition before the Extra Assistant Commissioner, which were relied on in both Courts below, and to some extent before this Board also, as indicating that the deceased was the victim of insane delusions. In complaining of the mismanagement of the respondent, the deceased said: "My daughter is dead, she had no trousers but one; she used to wear her brother's trousers" He also said: "During his incumbency as Karinder (Managing Agent) he did not pay any debts, on the contrary he incurred a further debt of Rs. 7,000 or Rs. 8,000." Their Lordships must observe, in the first place, that neither in the plaint, nor in the pleadings which followed, is there any mention of delusions; and, in the second place, that, in order to constitute an insane delusion, it must be shown, not only that belief in it was unfounded, but that it was so destitute of foundation that no one except an insane person would have entertained it.

In the present case, there is no reason whatever for supposing that the respondent did not contract debt to the amount stated during his twenty years' management of the estate. He knew the terms of his father's statement before the proof commenced; and, although the *onus* was upon him of showing that the statement was due to insane delusion, he had no evidence to contradict it. The suggestion that the deceased laboured under delusions with respect to his daughter's garment appears to their Lordships to be no less absurd. His statement with regard to that article of dress was said to be contradicted by the evidence of the appellant, Sajid Ali, who, in answer to a question by the respondent's pleader, stated: "My sister died in her husband's house, she was married to a *talukdar*. When she died, she was not wearing the *pijamas* of one of her brothers." Now the deceased, in his deposition said nothing to contradict that statement. Their Lordships would naturally infer from his deposition that the domestic incident, which is not shown to have been impossible, occurred whilst his daughter was still living in family with him, and was probably told to him, and not actually observed by him. At all events the statement does not afford the least evidence of insane delusion.

Their Lordships do not think it necessary to refer in detail to the evidence of all the witnesses who were adduced in support of the will. But the testimony of one witness, Dr. O'Brien, at one time Civil Surgeon at Barabanki, is valuable, because he is the only

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European expert who saw the deceased, and also because his character and skill were admitted by the respondent's Counsel to be beyond question. He visited the deceased on the 18th June, 1883, three weeks before the date of the will, and on that occasion gave him two certificates. One of these was to the effect that the deceased was "suffering from paralysis, the result of an extravasation of blood in the brain. He is physically unfit for attendance at Courts, and in my opinion should be exempted from such." The other was to the effect that the deceased was "in a sound state of mind, and is capable of understanding the effect of any will, deed, or other legal instrument he may wish to execute." In his deposition as a witness Dr. O'Brien affirmed the accuracy of these documents. He explained that the deceased "had recently suffered from an extravasation of blood in the brain," and that, in his opinion, any excitement would be likely to occasion fresh haemorrhage. He adhered to his opinion that the deceased was mentally sound, and quite capable of making a will. Upon the whole evidence, their Lordships have had no difficulty in coming to the same conclusion with the District Judge, and in rejecting the decision of the Judicial Commissioner. There is not only reliable oral testimony, but there are facts in the case established beyond controversy, all tending to show that the deceased continued in the same mental condition from the time of his first attack in 1879 until his second and fatal attack in October, 1883.

Their Lordships have had some difficulty in apprehending, and are quite unable to concur in, the reasons assigned by the Judicial Commissioner for his decision. The learned Judge, after an examination of the evidence, cites passages from the treatise of Dr. Ross on "Diseases of the Nervous System," and Dr. Quain's "Dictionary of Medicine," and then proceeds to quote various *dicta* of English Judges in cases of insanity and incapacity which appear to their Lordships to have little or no bearing upon the facts of the present case. Under the influence apparently of these medical and legal authorities, and relying on the fact spoken to by Dr. O'Brien, that there had been extravasation of blood in the brain, he held that the deceased must, at the time when he made his third will, have had "a fresh access of his terrible malady." That speculative theory, for it is nothing else, illustrates the danger of deriving inferences of fact from medical books and Judicial *dicta*, instead of depending upon the facts established by the evidence in the case. It does not seem to have occurred to the learned Judge that assuming the deceased to have had a "fresh access" before Dr. O'Brien saw him, which is neither

probable nor proved, he must have recovered from it before the 18th of June, and that there is not a particle of evidence to show that there was any change in his condition, bodily or mental, between that date and the execution of the will.

Their Lordships will humbly advise Her Majesty to dismiss the cross-appeal, and, in the original appeal, to reverse the decree of the Judicial Commissioner, to restore the decree of the District Judge, and to order Ibad Ali to pay to Sajid Ali and Wajid Ali their costs of the appeal to the Court of the Judicial Commissioner. Ibad Ali must pay to Sajid Ali and Wajid Ali their costs of these appeals.

Appeal allowed.

NOTE.

This decision of the Judicial Committee affirms the principle that for the validity of a will, it is essential that the testator should have a sound disposing mind, that is, that he must retain a degree of understanding to comprehend what he is doing, to have a volition or power of choice, so that what he does is really his own doing and not the doing of anybody else. Reference should be made in this connection to the elaborate judgment of Pigot and Banerjee, JJ., in *Woomes* v. *Rashmohini*, I. L. R. 21 Calc. 279, which was subsequently affirmed by the Privy Council, I. L. R. 25 Calc. 824. Whether a particular testator had the necessary capacity must be determined on the fact elicited in evidence, and, although his mental faculties may have been greatly enfeebled by physical weakeness, he may still be capable of devising and intelligently executing a will of a simple character, although unfit to originate or comprehend all the details of a complicated settlement. Reference should also be made to the earlier decisions of the Judicial Committee in *Barry* v. *Butlin*, 2 Moore, P. C., 482, and *Harwood* v. *Baker*, 3 Moore, P. C., 282. More recent cases before the Judicial Committee are those of *Romesh* v. *Rajani*, I. L. R. 21 Calc. 1; *Sala Mahomed* v. *Dame*, I. L. R. 22 Bom. 17. As to the burden of proof in this class of cases, see the decisions of the Judicial Committee in *Shama Charan* v. *Khettromoni*, I. L. R. 27 Calc. 521, and *Sukh Dei* v. *Kedarnath*, I. L. R. 23 All. 405. See also *Gungabai* v. *Bhugwandas*, I. L. R. 28 Bom. 530, where the solicitor, preparing the will, took a benefit under it.

Upon the whole question of testamentary capacity, reference may be usefully made to Redfield's Cases on the law of Wills, Part I, Sec. V, specially to the elaborate judgment in *Delafield* v. *Parish*, 25. New York 9.

ALANGAMONJORI DABEE

v

SONAMONI DABEE.

[*Reported in I. L. R., 8 Calc., 637.*]

THE FOLLOWING JUDGMENTS WERE DELIVERED BY THE COURT (GARTH, C. J., AND WHITE, J.) :—

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White, J.—The law is clear that, prior to the passing of the Hindu Wills Act (XXI of 1870), a gift by will to a person unborn at the time when the testator died was void, with a few exceptions which we need not consider now, as they have no application to the present suit.

The law was so declared in 1873 by Peacock, C. J., and Norman, J., overruling Phear, J., and also by the Judicial Committee of the Privy Council in 1872, affirming on this point the decision of the first named Judges, in the case of *Jatendra Mohun Tagore* v. *Ganendra Mohun Tagore*. (1)

I believe that the decision in the *Tagore case* (1), so far as it declared the invalidity of a bequest to persons unborn at the the testator's death, came with surprise upon some members of the Profession, if not upon the Profession generally; and that, until, that decision, it had at least been taken very much for granted that such bequests were valid.

When the Hindu Wills Act, however, was passed, and came into force, the law had been settled in the way I have mentioned by the highest authority known in our Courts.

The question to be determined here is, whether the Legislature have changed the law in this respect, and whether such a gift is now valid by virtue of the Hindu Wills Act, s. 2, which, amongst other sections of the Indian Succession Act, 1865, extends, to the wills of Hindus made on or after the 1st of September 1870, the 99th, 100th, and 101st sections of the Indian Succession Act.

I may observe in the first place, that the preamble of the Hindu Wills Act does not disclose any intention in the Legislature to extend the testamentary power of Hindus; the sole objects of the Act being, as there stated, to "provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the Wills of Hindus,"

(1) 4 B. L. R., O. C., 103; S. C., on appeal to P. C., 9 B. L. R., 377; L. R. I. A., Sup. Vol. 47.

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The sections of the Indian Succession Act above referred to occur in that chapter of the Act which relates to Void Bequests. Section 99, after laying down the rule that a bequest is void, "when made to a person by a particular description, and no such person exists at the testator's death," permits an exception when such person stands "in a particular degree of kindred to a specified individual, but his possession is deferred by reason of a prior bequest." Section 100 provides in effect that the deferred bequest must comprise the whole of the remaining interest of the testator in the thing bequeathed; and Sec. 101 contains a rule against perpetuties, which necessarily recognizes the exception contained in s. 99.

Did the Legislature, in passing the Hindu Wills Act, intend that the exception mentioned in the 99th section should extend to the case of Hindu wills executed after the 1st of September 1870; and, by thus conferring upon Hindu testators the power of bequeathing their property to unborn persons answering a certain description, change the law as laid down in the authority which I have cited?

This question might perhaps have admitted of an affirmative answer but for the fifth proviso in Sec. 3 of the Hindu Wills Act, which enacts, that "nothing in the Act contained shall authorize any Hindu to create in property an interest which he could not have created before the 1st of September 1870."

The words "to create in property an interest" apply both to the quantity and quality of the interest created, and in their natural and ordinary meaning include the capacity of a donee to take. A deceased Hindu testator may be said to create an interest in property which he could not have previously created as well when he makes a gift of his estate in-tail-male as when he makes a gift to a person unborn at the date of his death.

The proviso in question was, in my opinion, introduced into the Hindu Wills Act for the very purpose of preventing the application to Hindu testators of the specific sections mentioned in Sec. 2 of the Act from being construed into an enlargement of their testamentary power.

But it has been contended, and successfully contended, in the Court below, that a narrower construction should be put upon the language of the proviso, and that its operation should be confined to the capacity to take on the part of the donee.

The consequence of giving the wider meaning to the phrase is stated in the judgment of the lower Court to be, that "the whole of Sec. 99, except the first clause, is inoperative;

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Sec. 100 is entirely so; and Sec. 101 is inoperative, because it falls short of the restrictions existing without it." The learned Judge considered himself bound to avoid this consequence, and therefore read the phrase in the narrower sense, which allowed of full effect being given to the sections referred to. I may add that the argument of the learned Judge may be reinforced by a reference to the second clause of the 6th section of the Hindu Wills Act, which provides, that, in applying ss. 99, 100, and 101, 'son,' 'sons,' 'child,' 'children,' shall be deemed to include an adopted son, etc.

In arriving at this decision the learned Judge has applied a canon of construction, which has long been applied in construing English Acts of Parliament, and which is thus stated in the case cited by him—*Reg.* v. *Bishop of Oxford.* (1)

"A statute ought to be so construed, that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant."

I do not for a moment deny that that canon is the correct one to apply to many of the Acts of the Government of India, or that if it is the appropriate rule to apply here, the decision of the Court below is correct.

But the Hindu Wills Act is not drawn in the ordinary form of a statute, or indeed of an Act of the Government of India. It does not enact a series of provisions relating to Hindu wills, but, in point of form, it applies to certain Hindu wills certain portions only of the Indian Succession Act, and it does this by mentioning only the numbers of particular sections and the numbers of particular parts or chapters or portions of parts or chapters of the principal Act.

The sections and parts and portions of parts so specified are applied bodily and in *globo* as it were, without any limitation and without any adaptation of the sections to the peculiar law or custom or circumstances of Hindus.

Hindus were expressly excluded from the operation of the Indian Succession Act when it was passed, and although it is not improbable that the Legislature, even at that time, contemplated that, at some future day, the Act might be extended to Hindus, the Legislature must have considered in 1865 that the Act, as it then stood, was not in all respects suited for Hindus, otherwise Hindus would have been included.

(1) L. R., 4 Q. B. D., 245.

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It is obvious, that an unqualified extension to Hindus of a large number of sections and parts of an Act, in its origin passed for persons other than Hindus, would be attended with some most unexpected and undesired results, unless the operation of the applied sections were controlled.

The 3rd section, accordingly, enacts five provisos, the object of which, as it appears to me, is to prevent, so far as Hindus are concerned, the wholesale application, as it were, of the sections and chapters mentioned in Sec. 2 from directly or indirectly altering or affecting the Hindu law in those matters to which the provisos relate, and from thus introducing changes not contemplated by the Legislature.

Hence, in construing an Act of the Government of India passed in the form peculiar to the Hindu Wills Act, I think the sound rule of construction is to give their full and natural meaning to the provisos, and only to give effect to the enactments contained in the applied sections and chapters, so far as the latter do not contravene the full and natural meaning of the provisos; and that this is the sound rule of constrution, although the result of carrying it out may be, and in the present case is, that some of the applied sections are rendered nugatory.

This also appears to me to be the only safe rule in dealing with an Act like the one now before us. To construe such an Act by the canon laid down in the case cited would be to introduce changes into the Hindu law by a side wind as it were, and also when there is no clear expression on the part of the Legislature of an intention to alter that law.

I therefore reverse the decree of the Court below so far as it declares the validity of the bequest to the daughter's sons who were unborn at the death of the testator, and the validity of the other gifts in the will dependent on that bequest.

There will be a declaration that that bequest and the gifts dependent upon it are void, and that the plaintiff is entitled, as heiress of her deceased husband, to succeed to a widow's estate in the residue of his property.

Costs of the appeal to come out of the residuary estate.

Garth, C. J.—I am of the same opinion. I fully appreciate the arguments upon which the judgment of the Court below proceeds, and there is no doubt that, generally speaking, the rule of construction which is laid down in the *Bishop of Oxford's case* (1) is the correct one.

(1) L. R., 4 Q. B. D., 245.

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But, as regards the Hindu Wills Act, I cannot help thinking that there is much truth in what fell from Mr. Justice Pontifex in the case of *Cally Nath Naugh Chowdry* v. *Chunder Nath Naugh Chowdry* (1), that the difficulty in construing that Act arises "from the mode of legislation"; from the way in which upwards of 150 sections of the Indian Succession Act have been imported into Sec. 2 of the Hindu Wills Act, without sufficient consideration, as to whether some of those sections, which were quite appropriate in the first Act were equally so in the second. I doubt, for instance, whether it ever occurred to the learned authors of the Hindu Wills Act, that, in introducing ss. 99 and 100 of the Succession Act into Sec. 2 of the Wills Act, they were enacting provisions which were either inconsistent with the last proviso of Sec. 3 of that Act, or which would bring about any radical change in Hindu law.

And there is also much truth, as it seems to me, in another observation made by Mr. Justice Pontifex,—namely, that, at the time when the Hindu Wills Act was passed, it was by no means finally decided, that by Hindu law property could not be bequeathed to a person not in being at the time of the testator's death. This point could hardly be said to have been conclusively settled, until judgment was given in the *Tagore* case (2) by the Privy Council in the year 1872.

My opinion of this case proceeds upon two main points :—

First.—I think it clear from the preamble of the Hindu Wills Act, that it was merely passed for the purpose of providing rules for the execution, attestation, and interpretation of Hindu Wills, and was not intended to introduce any material change in Hindu law. This is not only apparent from the language of the preamble itself, but also from the Act, that the Act only extends to the Province of Bengal and to the Presidency-towns of Madras and Bombay. It could never have been intended to make an important change in the Hindu law in those portions only of the Empire, and to leave that law unchanged in all the other provinces.

Secondly.—I think that the last clause of Sec. 3 ought not to be read in the restricted sense which is attributed to it by the learned Judge in the Court below. If a Hindu testator leaves a life-estate in land to a person who is not born at the time of the testator's death, that is, in my opinion, an attempt "to create an interest in property which he could not have created before the Act." In other

(1) I. L. R., 8 Calc., 378 ; S. C., 10 C. L. R., 207.
(2) 9 B. L. R., 377 ; S. C., L. R., I. A., Sup. Vol. 47.

words, the prohibition, as it seems to me extends to the person who is to take the interest, as well as to the interest itself.

NOTE.

In this case, Garth, C. J., and White, J., reversing the decision of Wilson J. (I, L. R., 8 Cal. 157), held that notwithstanding the express words of Sec. 99 of the Indian Succession Act (which is one of those extended by the Hindu Wills Act), a Hindu cannot make a bequest to a person unborn at the death, but born between that date and the termination of a previous estate after which his interest is to take effect. This view is founded on the ground that Section 3 of the Hindu Wills Act (which lays down that the Act does not aurhorize the *creation* of any interest in property which could not have been created before) refers not only to the quantity and quality of the interest created, but also to the capacity of the donee to take. The practical effect is to make sections 99-101, and perhaps section 102 as well of the Indian Succession Act, inapplicable to Hindu wills (*Ramlal* v. *Kanailal*, I. L. R. 12 Calc. 663). See the matter discussed in Mukhopadhyay on Perpetuities, (Tagore Law Lectures, 1898), p. 80. See also *Kally Nath* v. *Chunder Nath*, I. L. R., 8 Calc. 378.

Upon the question of Sec. 3 of the Hindu Wills Act, affecting the applicability of Sec. 82 of the Indian Succession Act, see *Bhoba Tarini* v. *Peary Lall*, I. L. R., 24 Calc. 646 (650); and upon the question of its affecting Sec. 57, see *Subba Reddi* v. *Lakshmammal*, I. L. R., 30 Mad. 369, affirming 16 M. L. J. 491 (where notice the observations in the dissentient judgment of Subrahmanya Ayyar J.)

BHAGABATI BARMANYA

v.

KALI CHARAN SINGH.*

[*Reported in I. L. R., 32 Calc., 992.*]

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The last will and testament of the testator was in the following terms :—

(After giving an account of his properties.) "But life is transitory ; and there is no knowing what may happen at any moment. I therefore lay down, in the following clauses, the rules according to which business shall be conducted and possession held after my death in respect of my moveable and immoveable properties. If I recover from my illness, I shall have the power to alter this will ; otherwise this will shall be my last will and testament.

"My mother Fudan Kumari Barmanya and my wife Bhagabati Barmanya shall, as long as they live, hold possession of all my properties, moveable and immoveable, and enjoy and possess the same on payment of the Collectorate revenue and the Zemindar's rents and by maintaining intact and continuing the service of the established deities and the ancestral rites (*deva-kirti* and *pitri-kirti*) according to the practice heretofore obtaining, and shall pay off my debts and realize my dues. They shall not be competent in any way to transfer the immoveable property to any one. On the death of my mother and my wife, the sons of my sisters Golap (Sundari) Barmanya and Annapurna Barmanya, that is to say, their sons, who are now in existence as also those who may be born hereafter, shall, in equal shares, hold the said properties in possession and enjoyment by right of inheritance (*uttaradhikari sutre*) and shall maintain intact and continue the service of the established deities and the ancestral rites (*deva kirti* and *pitri kirti*) according to the practice heretofore obtaining. In the event of any one amongst the sons of my sisters being a minor at the time of the death of my mother and my wife (*i.e.* of the survivor) his mother or his brother shall, during his minority, hold possession (of the properties) as his guardian. I make a gift of my reversionary interest in the properties held in possessien by the co-wife of my maternal grandmother to the son of my sister Annapurna.

"2. My mother and my wife shall maintain my sisters Ramdhan Barmanya, Braja Sundari Barmanya, Golap Barmanya

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and Annapurna Barmanya, with their sons and daughters as also my sisters' husbands Golab Chunder Sinha and Mano Mohan Sinha in the same way as I have been doing. They shall by no means be competent to act otherwise. If they do, the said parties shall be entitled to claim and obtain reasonable maintenance.

"3. My sisters Ramdhan and Braja Sundari aforesaid are sonless widows. My mother and my wife and on their death my nephews (sister's sons) shall pay them a monthly allowance of Rs. 10 each for the performance of their religious ceremonies and for the expenses of pilgrimage, over and above their maintenance. It will be proper for my said two sisters to look after the comforts of my mother, failing which they shall not get the monthly allowance in cash.

My mother, my wife, my sisters, my sisters' sons and my sisters' husbands shall continue to live in their respective apartments in my *khanabati* and other buildings constructed for residential purposes in the same way as they have been doing. My sister Annapurna Barmanya shall live with her husband and her son in the apartment occupied by my wife. My *katchari* is being held in my *baitakhana* house, both on the ground floor as well as on the first, and gentlemen and relatives have access thereto; and this practice shall be continued."

The judgment of the Court, which was delivered by the Chief Justice was as follows:—

Maclean, C. J.—Ram Lal Sinha was a Hindu inhabitant of the district of Murshidabad in Bengal, but it does not appear by what school of law he was governed—the Mitakshara or the Dayabhaga. He died on the 3rd March 1868, having on the day previous executed a will, the construction of the first clause of which is now in controversy. He left him surviving his mother Fudan Kumari Barmanya, his wife Bhagabati Barmanya, his sisters Ramdhan and Brojo Sundari, who were widows and sonless, and Annapurna and Golapsundari, Monmohan Sinha, the husband of his sister Annapurna, and Golap Chandra Sinha, the husband of his sister Golapsundari, and three nephews Jagabandhu Sinha, Nilkant Sinha, and Shama Charan Sinha, the two former being the sons of his sister Golapsundari and Shama Charan being the son of his sister Annapurna. They were all dependent members of his family; he referred to them in his will and he made provision for all of them. After his death and within a few months Golap Sundari gave birth to a son, who was named Madhusudan.

In the year 1872, Nilkant was given in adoption to Chhya Kumari *alias* Surbana Kumari Barmanya, Fudan Kumari's step-mother.

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Fudan Kumari died in the year 1887. Nilkant died in the year 1894, and the present plaintiff Kali Charan is his only son. Jagabandhu and Madhusudan died in the year 1901. The former left a widow Basanta Kumari, who is the third defendant in this case.

In October 1901, Bhagvati Barmanya executed in favour of Shama Charan Sinha a deed of relinquishment by which she surrendered her life estate, and by virtue of this deed Shama Charan, who is defendant No. 2, is in possession of the estate left by Ram Lal. Bhagbati Barmanya is the first defendant in the suit.

The suit under appeal was commenced on the 31st May 1902, and it was prayed that a decree might be passed declaring that Nilkant had a vested remainder in a third share of the estate left by Ram Lal Sinha and that the deed of relinquishment executed by Bhagvati Barmanya could not affect such share after her death.

The material portion of Ram Lal's will so far as it is in controversy has been thus translated :

"My mother Fudan Kumari Barmanya and my wife Bhagvati Barmanya shall as long as they live hold possession of all my properties moveable and immoveable and enjoy and possess the same on payment of Collectorate revenue and Zemindar's rents, and by maintaining intact and continuing the services of the established deities and the ancestral rites according to the practice heretofore obtaining aud shall pay off my debts and realise my dues. They shall not be competent to transfer the immoveable property to any one. On the death of my mother and wife the sons of my sisters Golap Sundari Barmanya and Annapurna Barmanya, that is to say, their sons who are now in existence, as also those who may be hereafter born, shall in equal shares hold the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of the established deities and ancestral rites according to the practice heretofore obtaining. In the event of any one amongst the sons of my sisters being a minor at the time of the death of my mother and my wife (*i.e.* of the survivor) his mother or his brother shall during his minority hold possession (of his property) as his guardian." Exception was taken during the argument to the words "by right of inheritance," and it was stated that they did not correctly represent the Bengali words *uttradhikari sutre* used in the will. The literal translation should be "as after-takers." The expression *uttradhikari* (after-taker) is applied indiscriminately to cases of intestate as well as testamentary succession though cases of intestate succession being more frequent the word is fast assuming a technical meaning, *i.e.* "an heir," and it may be that the testator used the

expression in the same sense, *viz.*, that the nephews would take with the same incidents of proprietorship as heirs would.

The first portion of the first clause of the will created an estate for life jointly in favour of the mother and widow of the testator, and then of the survivor of them, and there can be little doubt that the bequests for life were followed in the second portion of the clause by a bequest of the remainder in favour of the sister's sons of the testator living at the date of the will and those who would come into existence thereafter. And the real question that seems to have been raised between the parties in the Lower Court and which was decided against the first two defendants was, whether the bequest to the nephews as a class some of whom were not in existence at the date of the testator's death, and could not therefore under the Hindu Law as expounded in *Tagore* v. *Tagore* (1) be recipients of any portion of the remainder, was void as regards even those who were living and could be the subjects of the tastator's bounty.

A further point has, however, been raised in this Conrt, *viz.*, that there was no bequest in favour of the nephews and that the second portion of the first clause only declared the right of inheritance of the nephews after the death of the mother and the widow, as they would be heirs under the Hindu Law in case of intestate succession. Such a construction of the clause was not suggested in the Lower Court, and the attention of the parties was not drawn to the necessity, which such a construction would involve, of adducing evidence as to the school of law by which the testator was governed, and as to the existence at the date of the will, or the possible existence at the time the succession might open out of an agnate, who might exclude the nephews. The names of the parties indicate that the family must have in recent times migrated into Bengal from Provinces where the Mitakshara system prevails. It seems to us, however, to be clear that the testator did not intend to declare simply a right of inheritance as has been contended for. The mother was no heiress according to the Hindu law, there being the widow, and he gave them a joint life estate. He did not intend to give to his wife a Hindu widow's estate as she would be entitled to according to the law of inheritance, for that would exclude the mother and might deprive his nephews, whom and whose parents he evidently wished to benefit, of a vested remainder and leave them the chance of a contingent reversion. It must be presumed that the testator knew the law and that under it the heirs of such of them as would predecease

(1) (1872) L. R. I. A. Supp. 47 ; 9 B. L. R. 377 ; 18 W. R., 359

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his widow or mother, whoever died last, would not be entitled to any share in the inheritance, and it is clear from the entire scheme of the will that he could not have intended either that any other person should intervene between his mother and widow and his nephews. His nephews take under the will, after the life-estates, a vested interest, *i.e.*, the remainder of his estate burdened with the charge of performing certain duties. It was a devise, and the idea of laying down the rule of succession according to the Hindu law was altogether foreign to the mind of the testator.

Coming now to the real question raised in the case, if the executant of the will in controversy were an Englishman or a person governed by the Indian Succession Act of 1865, the bequest to the nephews as a class would not infringe the rule against remoteness. The gift in the present case was intended to have effect after the close of two lives in being, and the ascertainment of the class was not to be deferred thereafter.

There is in it no vice of remoteness. The case of *Leake* v. *Robinson* (1), *Jee* v. *Audley* (2), *Smith* v. *Smith* (3), *Dungannon* v. *Smith* (4), and *Pearks* v. *Moseley* (5) do not lay down any rule which would render this gift void. Sections 100, 101, and 102 of the Indain Succession Act, even if they could be applied in this case, would not also make the bequest void.

The rule as to invalidity of a bequest by a Hindu to a person, who is unborn at the date of the death of the testator, rests on the peculiar doctrine of Hindu law expressed by the phrase relinquishment in favour of the donee, who is a sentient being." With certain well-known exceptions pointed out in the *Tagore case* (6) no gift by a Hindu can be valid, unless it is made to a person or persons in existence. The rule has been often repeated and it renders the bequest to such of the nephews of Ram Lal as would be born after his death inoperative.

There is no rule of Hindu law (so far as we are aware and our attention has not been drawn to any text of sages or approved commentaries) to the effect that a gift *inter vivos*, or a bequest to a class of persons some of whom are incapable of taking by reason of the rule that the gift is valid only if it is made to a sentient

(1) (1817) 2 Mau., 363 ; 16 R. R., 168.
(2) (1787) 1 Cox. Eq. Cas. 324 ; 1 R. R., 46.
(3) (1870) L. R., 5 Ch. 342.
(4) (1845) 2 Cl. and F. 546.
(5) (1880) 5 App. Cas. 714.
(6) (1872) L. R. I. A., Supp. 47 ; 9 B. L. R., 377 ; 18 W. R. 359.

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being capable of taking, is void also as regards those who are sentient and capable of taking. Where then is the rule contended for on behalf of the appellant to be found? The analogy to English law, even if we were bound to accept it, does not hold good, as it is based on peculiar rules inapplicable to Hindus.

But even in England the rule in *Leake* v. *Robinson* (1) has been followed not without expressions of reluctance. In *Leake* v. *Robinson* (1) itself Sir William Grant said: "Perhaps it might have been as well if the Courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could be clearly ascertained." *In re Moseley's Trusts* (2), the Lord Justices similarly expressed their non-concurrence with the reason of the rule though they were bound to follow it; and *Pearks* v. Moseley (3), which was an appeal from the decision of the Lord Justices *in re Moseley's Trusts* (2), Lord Selborne, Lord Penzance and Lord Blackburn sufficiently indicated their inclination against the rule, which, however, was settled in England by a long series of cases and could not be disturbed except by legislation.

In India, however, we stand on a different footing. There is no series of cases, no current of decison, which we are likely to disturb by adopting a different rule. There is a clear conflict of authorities in the Indian Courts. *Bramamoyi Dasi* v. *Jages Chundra Datta* (4), *Soudamony Dasee* v. *Jogesh Chunder Dutt* (5), *Kherodemoney Dassee* v. *Doorgamoney Dassee* (6), *Jairam Narronji* v. *Kuver Bai* (7) and *Rajomoyee Dassee* v. *Troylukho Mohiney Dassee* (8) follow the rule of English Law; while in *Manjamma* v. *Padmanabhayya* (9), *Mangaldas Parmanandas* v. *Tribhubandas Narsidas* (10), *Tribhuban Das Ruttonji Mody* v. *Ganga Das Tricumji* (11), *Krishnarao Ram Chandra* v. *Benabai* (12), *Khimji Jairam Narroji* v. *Morarnji Jairam Narronji* (13), *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (14) and *Gordhandas Soonderdas* v. *Bai Ramcoover* (15) a different view has been entertained.

The proposition that a gift must fail in its entirety because

(1) (1817) 2 Mar., 363; 16 R. R., 168.
(2) (1879) 11 Ch. D. 555.
(3) (1880) 5 App. Cas. 714.
(4) (1871) 8 B. L. R., 400.
(5) (1877) I. L. R., 2 Calc. 262.
(6) (1878) I. L. R., 4 Calc. 455.
(7) (1885) I. L. R., 9 Bom. 491.
(8) (1901) I. L. R., 29 Calc. 260.
(9) (1889) I. L. R., 12 Mad. 393.
(10) (1891) I. L. R., 15 Bom. 652.
(11) (1893) I. L. R., 18 Bom. 7.
(12) (1895) I. L. R., 20 Bom. 571.
(13) (1897) I. L. R., 22 Bom. 533.
(14) (1897) I. L. R., 24 Calc. 646.
(15) (1901) I. L. R., 26 Bom. 449.

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effect cannot be given to a part of it, and that some person or persons, whom the donor never intended to benefit, should receive the entire property covered by the gift, to the exclusion of all the intended donees, is repugnant to Hindu notions. It obviously defeats the intention of the testator. Courts have therefore struggled te carry out the intention of a testator as far as possible, and as observed by the Judicial Committee in *Rai Bishen Chand* v. *Asmaida Koer* (1), "cases are not rare in which a Court of construction finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely. *Hurdey Narain* v. *Rooder Perkash* (2), *Ram Lal Sett* v. *Kanai Lal Sett* (3) *and Srinivasa* v. *Dandayudapani* (4), are instances which may be noted, besides *Rai Bishen Chand* v. *Asmaida Koer* (1). These latter are cases of gifts *inter vivos*, but the Hindu Law of Wills is a recent development of the Hindu Law of gifts *inter vivos* (*Tagore* v. *Tagore*) (5) and the doctrine of the invalidity of bequests to the unborn has been taken bodily from the law of gifts. The Indian Legislature has also assimilated the law of transfers by act of parties as contained in sections 13, 14 and 15 of the Transfer of Property Act to the law of wills as we find it in sections 100, 101 and 102 of the Indian Succession Act.

The rule laid down in *Leake* v. *Robinson* (6) was applied in this Court *Bramamayi Dasi* v. *Jages Chandra Dutt* (7), *Soudaminy Dassee* v. *Jogesh Chandra Dutt* (8) and *Kherodemoney Dassee* v. *Durgamoney Dassee* (9); but the tide turned as soon as the decision of the Judicial Committee in *Rai Bishen Chand* v. *Asmaida Koer* (1), which was pronounced in March 1884, was known in India. In *Rai Kishori Dasi* v. *Debendra Nath Sircar* (10), Tottenham and Field JJ. observed, referring to the case of *Rai Bishen Chand* (1): "The case was no doubt a case not of a will but of a deed *inter vivos* and intended to have immediate operation; and as regards the applicability of the principle to Hindu wills, their Lordships decided nothing definitely. They did, however, refer to illustration (b) to section 102 of the Succession Act (X. of 1865) as importing into

(1) (1884) I. L. R., 6 All. 560; L. R., 11 I. A., 164.
(2) (1883) L. R., 11 I. A., 26. (3) (1886) I. L. R., 12 Calc. 663
(4) (1889) I. L. R., 12 Mad. 411.
(5) (1872) L. R. I. A., Supp. 47; 9 B. L. R., 377, 18 W. R. 359.
(6) (1817) 2 Mar., 363; 16 R. R. 168. (8) (1877) I. L. R., 2 Calc. 262.
(7) (1871) 8 B. L. R., 400. (9) (1878) I. L. R., 4 Calc. 455.
(10) (1884) I. L. R., 15 Calc. 409, 415.

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India an English rule of construction, which usually defeats the intention of the testator; and it would appear that the adoption of the English rule of construction did not recommend itself to their Lordships on that occasion as a sound principle applicable to the wills of Hindus. If we had to decide whether this principle ought to be adopted in this country we should perhaps think it necessary to refer the question to a Full Bench, having regard to the recent observations of the Privy Council in the case just referred to, and because we ourselves entertain some doubt as to whether this principle ought to be followed in construing the rules of Hindus.' In *Ram Lal Sett* v. *Kanai Lal Sett* (1) which, as already stated, was also a case about a gift *inter vivos*, Wilson J. pronounced a decided opinion as to the inapplicability of the rule in *Leake* v. *Robinson* (2) to the wills of Hindus; and his view was adopted in this Court in *Bhabatarani Debya* v. *Peary Lall Sanyal* (3). In *Rajomoyee Dassee* v. *Troylukho Mohiney Dassee* (4), however, Stanley J. adopted the rule in *Leake* v. *Robinson* (2), but it does not appear that his attention was drawn to *Ram Lal Sett* v. *Kanai Lal Sett* (1) and *Bhabatarani Debya* v. *Peary Lall Sanyal* 3). The High Courts at Madras and Bombay have, as we have seen, adopted the view expressed by Wilson J.

In re Coleman and Jarrom (5) has been cited before us. Sir George Jessel was there dealing with a case to which the rule guarding against the vice of remoteness did not apply; and it is not now referred to as being a case of the same class as *Leake* v. *Robinson* (2). But some of his observations are pertinent to the case before us. He says:—"No doubt the general rule of construction is that in a gift to a class, where the class consists of children or descendants, those members of the class take who are capable of taking at the death of the testator. Now, first of all, what is the rule. * * The true rule is that those members of the class take, who are at his death capable of taking. The rule of construction is to ascertain the intention of the testator as artificially expressed. * * Now I think there is a convenient mode of interpreting the testator's intention, and it is this. The testator may be considered to have a primary and secondary intention. His primary intention is that all members of the class shall take, and his secondary intention is that, if all cannot take,

(1) (1886) I. L. R., 12 Calc., 663.
(2) (1817) 2 Mer. 363; 16 R. R., 168.
(3) (1897) I. L. R., 24 Calc. 646.
(4) (1901) I. L. R., 29 Calc. 260.
(5) (1876) 4 Ch. D. 165.

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those who can shall do so. Both intentions co-exist and are frequently exemplified."

The bequest in the case now before us is not affected by the vice of remoteness as understood by the law in England: it does not offend against the law as to perpetuities. The only question is, what was the primary intention of the testator and what the secondary. His primary intention may be taken to be that all his nephews then born and those who may be born afterwards should take equally. But those that had then been born were the immediate objects of his affection and bounty. And the idea must have occurred to him that, if any other nephews were not born, those who were then in existence, though not specifically named, should take the whole of his estate. From this point of view his primary intention may be taken to benefit those, who were then born; and following the train of reasoning that was adopted in *In re-Coleman and Jarrom* (1) we may safely say that, if not his primary intention, his secondary intention was, as is clear from the several clauses of his will, that, at least, those of his nephews, who were then capable of taking, should take as already mentioned. The testator's sisters, their husbands and sons were living with him as dependent members of his family; he made provisoins for their maintenance and residence after his death; his nephews were objects of his affection and he knew that, unless he bequeathed his estate to them by his will, as he has done, they might have no interest in his estate, and if they died before the death of his mother and widow, their children and parents would not take anything. He would be naturally inclined to favour such of his nephews, who were then born. We may take it that his secondary intention was that at least such of his nephews as were then born would take. Since the present case was argued our attention has been directed to the case of *Advocate-General* v. *Karmali Rahimbhai* (2) in which the observations of the Court appear to support the view taken above.

For these reasons we are of opinion that the bequest to the plaintiff's father is valid. We accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) (1876) 4 Ch. D. 165.
(2) (1903) I. L. R., 29 Bom. 133.

NOTE.

The decision of the Special Bench of the Calcutta High Court in this case finally settles a point as to which there was previously considerable divergence of judicial opinion. It is now definitely settled that the rule in *Leake* v. *Robinson*, 2 Merivale, 363; 16 R. R. 168, that a bequest to a class, some of whom cannot take, fails as to all, is not to be applied to settlements by Hindus, whether by way of gift *inter vivos*, or, testamentary bequest; where a gift fails as to some members of a class by reason of this principle that a gift is valid only if it is made to a sentient being capable of taking, it nevertheless takes effect as to the members who are in existence and capable of taking. This view is identifical with what had been previously put forward in Mukhopadhyay on Perpetuities (Tagore Law Lectures 1898), Lectures VI & VII, pp. 139—182, which may be usefully referred to as furnishing a review of all the authorities on the subject, both English and Indian, and of the principles on which they are based. It should not be overlooked that this decision does not touch cases of gifts which are void on the ground that they transgress the Rule against Perpetuities.

The rule laid down in the leading case has been adopted in Madras. See *Ranganadha* v. *Baghirathi*, I. L. R. 29 Mad. 412.

NORENDRA NATH SIRCAR

v.

KAMALBASINI DASI.*

[*Reported in I. L. R., 23 Calc., 563.*]

THE JUDGMENT OF THEIR LORDSHIPS WAS DELIVERED BY :

1896. February, 22.

Lord Macnaghten.—In this case there is a question as to the effect of the Will of Hara Nath, a Hindu gentleman, who died on the 14th of January 1882. Hara Nath left three sons. The eldest Jogendra Nath had attained majority at the time of his father's death. The other two, who were children by a junior wife, were then infants of tender age.

The Will, which was made on the day on which the testator died disposed of his property in the following manner :—

"My three sons shall be entitled to enjoy all the moveable and immoveable properties left by me equally. Any one of the sons dying sonless, the surviving son shall be entitled to all the properties equally."

Jogendra Nath was appointed sole executor with powers of management during the minority of his brothers. On their attaining majority he was directed to "make over charge of their properties to them."

Jogendra Nath proved the Will, and took upon himself the management of the testator's estate. He died on the 2nd of December, 1886. He left a widow, but died sonless.

In these circumstances a contest arose as to the destination of Jogendra Nath's share. The surviving sons of Hara Nath by their mother and next friend claimed it as theirs under the terms of the Will. On the other hand, Jogendra's widow, as his heir, contented that on the testator's death the executory gift over in the event of any of his sons dying sonless became incapable of taking effect, having regard to the provisions of section 111 of the Succession Act 1865, which was made applicable to the Wills of Hindus by the Hindu Wills Act, 1870.

Section 111 of the Act of 1865 enacts that "where a legacy is given, if a specified uncertain event shall happen and no time is mentioned in the Will for the occurrence of that event, the legacy cannot take effect, unless such event happen before the period when

* *Present* :—LORDS MACNAGHTEN and MORRIS, and SIR R. COUCH.

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the fund bequeathed is payable or distributable." In the illustrations to that section the following case is given :—

"(b). A legacy is bequeathed to A and in case of his death without children to B. If A survives the testator or dies in his life time, leaving a child, the legacy to B does not take effect."

The Subordinate Judge referred to several text writers and cited a number of authorities to prove that, according to the law still in force in England, and according to the law as administered in India before the date of the Succession Act 1865, an executory gift, such as that contained in the testator's Will, would have effect, in the event of the first taker dying sonless, at any time. Then turning to the Act he held with some hesitation that it was not the intention of the Legislature to alter the law in India by departing from the law of England. The learned Judges of the High Court on appeal reversed the decision of the Subordinate Judge. They held that the Act of 1865 had altered the law, and that according to section 111 of that Act as explained by illustration (b) the original gift to the three sons in equal shares became indefeasible on the testator's death.

It is hardly necessary for their Lordships to do more than express their concurrence with the judgment of the High Court. But they think it may be useful to refer to some observations in a recent case before the House of Lords as to the proper mode of dealing with an Act intended to codify a particular branch of the law. "I think," said Lord Herschell in the *Bank of England* v. *Vagliano* (1) "the proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specially dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions....."

(1) (1891) A. C., 107.

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The learned Judges of the High Court have taken the line which was approved in the House of Lords. The Subordinate Judge followed exactly the opposite course. His judgment with much display of learning and research is a good example of the practice which Lord Herschell condemns and the mischief which the Succession Act, 1865, seems designed to prevent. To construe one Will by reference to expressions of more or less doubtful import to be found in other Wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on Wills which cumber our English Law Reports in order to understand and interpret Wills of people speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life seems almost absurd. In the Subordinate Courts of India such a practice, if permitted, would encourage litigation and lead to idle and endless arguments. The Indian Legislature may well have thought it better in certain cases to exclude all controversy by positive enactment. At any rate in regard to contingent or executory bequests the Succession Act, 1865, has laid down a hard and fast rule, which must be applied, wherever it is applicable, without speculating on the intention of the testator.

Two points were urged by the learned counsel for the appellants, which do not seem to have been argued in the Courts below. In the first place, it was suggested that in section 111 of the Act of 1865, the qualification or proviso, "unless a contrary intention appears by the Will," is to be understood. In some sections of the Act those words are to be found. Full effect must be given to them where they occur. But, where the qualification is not expressed, there is surely no reason for implying it. The introduction of such a qualification into section 111 would make the enactment almost nugatory. Then it was argued that in the present case the fund is not "payable or distributable" within the meaning of the enactment, until the testator's younger sons attain their majority. But in their Lordships' opinion that is not the effect of the Will. The period of distribution is the death of the testator. It would be impossible to hold that that period is to be postponed by reason of the personal incapacity of some of the beneficiaries

The view of the High Court that section 111 applies to bequests of all descriptions of property, there being no difference in India between real and personal property, was not impugned in the argument before their Lordships.

1896.

Norendra Nath Sircar v. Kamalbasini Dasi.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Appeal dismissed.

NOTE.

This decision of the Judicial Committee may be treated as an authority for two propostions:

(i) That in regard to contingent or executory bequests, Sec. 111 of the Indian Succession Act (made applicable to Hindu wills by the Hindu Wills Act) has laid down a hard and fast rule which must be applied, wherever it is applicable, without speculating on the intention of the testator.

(ii) That a Code must be construed according to the natural meaning of the language used, and, not on the presumption that it was intended to leave the existing law unaltered.

As regards the first point, it is to be observed that the effect is to make the ruling in the Privy Council Cases of *Soorjemoney* v. *Denobundo*, 9 Moo. I. A. 135 and *Kristoromoney* v. *Norendra*, L. R. 16 I. A. 29, limited by Sec. 111 of the Succession Act where it applies. Where it does not apply, as for instance in gifts or settlements *inter vivos*, the earlier Privy Council Cases will apply.

As regards the second point, it is to be observed that it is perfectly legitimate to construe any provision of a Statute, as to the scope of which there is room for reasonable doubt, by a reference to the previous law on the subject. This was done by the Judicial Committee in *Ishoree* v. *Chutterput*, 3 Moo. I. A. 100 (130), and *Brown* v. *McLachlan*, L. R. 4. P. C. 543 (550), and by the Calcutta High Court in *Ramkanai* v. *Harinarain*, 2. C. L. J. 546, and *Kripa Sindhu* v. *Annada*, I. L. R. 35 Calc. 34; 6. C. L. J. 273.

BAI MOTIVAHU

v.

BAI MAMUBAI.*

[*Reported in I. L. R., 21 Bom., 709.*]

THEIR LORDSHIPS' JUDGMENT WAS DELIVERED BY

1897. March, 20.

Sir R. Couch.—The question in this appeal arises in a suit brought by the respondent Mamubai against the appellant and Dossa Morarji and Khimji Lakmidas, the other respondent, for the administration of the estate of Jetha Ladhani, a Hindu merchant of Bombay, and for the construction of his will. He died in November, 1869; the will is dated the 18th of October 1869, and by it the defendants are appointed his executors and executrix. Having in the previous clauses directed Rs. 35,000 to be expended on his funeral ceremonies, and given various legacies, the testator in the seventh and eighth clauses says:—

"7. Agreeably to what is written above, the whole of the money which I have resolved to be paid or expended on account of the 'lagacies' and for the expenses of my funeral ceremonies for 12 months and on account of the *Sadavart* a religious institution and for other *dharam* (religious or charitable) purposes according to the above particulars is to be paid out of my funds in ready cash, but whatever my (landed) 'estate,' that is, immoveable property there is, is not to be touched by my vakils (executor or representative) or vakilatan (executrix or representative) for these purposes, but after my death shall have taken place a 'trust deed' is to be made as soon as practicable of my garden, dwelling-house, rope-walk, warehouses (or godowns), houses, estables, lands, and whatever other immoveable property that is (landed) 'estate' there is belonging to me in the island of Bombay, and the whole is to be invested in a 'trust.' As to the 'trustees' thereof, my two vakils and vakilatan and in conjunction with them my friend Seth Thakur Khatav Makanji, four persons, jointly are duly to become 'trustees,' and these 'trustees' four in number are to collect the income of the whole property and, after deducting therefrom the expenses connected therewith, money is to be paid out of the net income, whatever it may amount to, for the personal expenses of my wife Motivahu and my daughter Mamu, and for the children of my daughter Mamu after her death, agreeably to the fourteenth and fifteenth clauses of this 'will,' and after paying the same whatever income may remain is to be used for the purposes of my wife Motivahu and my daughter Mamu and her children in such manner as my 'trustees' think proper.

"8. In the seventh clause mentioned above, it is resolved to invest the whole of my immoveable property in 'trust' and to collect the income thereof, but the 'trustees' are not to demand any rent for the place out of my property which

* *Present*:—LORDS WATSON, HOBHOUSE and DAVEY, and SIR R. COUCH.

may be used as a residence for my family, and should any of the 'trustees' depart this life the surviving 'trustees' are to appoint another 'trustee,' and after the death of my daughter Mamu should there be any children born of the womb of my daughter the 'trust' is to stand valid during the life-time of such children. Afterwards the heirs of the said children are duly to apportion and receive this property. But should there be no children born of the womb of my daughter Mamu, then after the death of Mamu and of my wife Motivahu this 'trust' is to become void, and this property is to be delivered to such persons as my daughter Mamu may direct it to be delivered by making her will."

The eighteenth clause relates to the moveable property. After providing for the birth of a son or daughter of Mamu it says :—

"According to these particulars (and) agreeably to what is written above, my property is to be apportioned and distributed; and should no child be born of the womb of my daughter Mamu (which may God forbid), in that event, on the death of my wife Motivahu and of my daughter Bai Mamu taking place, my moveable property is to be expended on such good *dharam* (religious or charitable works) in my name as may continue as long as the moon lasts; and should it appear that any one would prevent this property from being given away for *dharam* (religious or charitable purposes) by reason of the rules of the Sarkar, the same is to be given to such persons as my daughter Mamu may direct it to be given by making her will."

The nineteenth clause relates to the jewels of the testator and his wife, and is similar to the eighteenth.

After a reference to the Commissioner of the Court to take accounts and make enquiries, and his making his certificate and report, the suit was heard on the Original Side of the High Court by Mr. Justice Farran, who on the 19th December 1891, made a decree declaring among other matters that "the gift contained in paragraph eight of the said will to such person as the plaintiff Mamubai may direct by her will is valid, but this Court cannot and doth not determine upon whom the property referred to in the said eighth clause will devolve in case the plaintiff Mamubai shall die without making or leaving a will." In his judgment the learned Judge says that to all intents and purposes there was an absolute gift to Mamubai; that the persons to whom the property was given took it from her and not from the testator; that Mamu became the owner. He refers to Theobald on Wills, p. 352, and says that *Robinson* v. *Dusgate*(1) and *Hixon* v. *Oliver* (2) were cases very like the present. Their Lordships are unable to agree with the learned Judge in holding that there was an absolute gift. The case in Vernon has been questioned by a great authority. (Sugden on Powers, 109, 8th edition, referring in a note to *Buckland* v. *Burton*(3) and *In re*

(1) 2 Vernon, 180. (2) 13 Ves., 108. (3) 2 H. Bl., 136.

1897.

Bai Motibahu v. Bai Mamubai.

Mortlock's Trust (1). And in *Hixon* v. *Oliver* (2) the gift was to the testator's wife "to be disposed of as she thinks proper to be paid after her death." It was not a power, but a disposition vesting the whole interest in the legatee, but deferring the payment, and is distinguishable from the present case. Further, it is to be observed that the declaration in the decree is not consistent with the judgment, which seems to require a declaration that Mamu was absolutely entitled. Motivahu appealed against the decree and the appeal was heard before Sir Charles Sargent, C.J., and Bayley, J., who on the 15th March, 1895, ordered the decree to be amended by inserting the words "in existence at the date of the death of the said testator" in two clauses of the decree after the words "in paragraph eight of the said will to such person," and confirmed the decree so amended. Their Lordships have not before them the reasons of the learned Judges for making this amendment. It is obviously made for the purpose of limiting the exercise of the power; but it is open to the objection that it inserts in the power words which are not in the will. Their Lordships propose to make a verbal variation in this part of the decree.

The question in the present appeal is whether such a power in the will of a Hindu is valid.

In *Sreemutty Soorjeemoney Dossee* v. *Denobundeo Mullick* (3), Lord Justice Knight Bruce, in delivering the judgment of this Board, said: "Whatever may have formerly been considered the state of that (the Hindu) law as to the testamentary power of Hindus over their property, that power has now long been recognized and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law, in allowing a testator to give property whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power; and that it is their duty to advise Her Majesty that such a power does exist." It appears from the report cited (p. 129) that this had also been held by the Supreme Court at Calcutta. In the previous part of the judgment of the Board, the gift over had been held to be on a failure of male issue of any of the testator's five sons at the time

(1) 3 K. and J., 456. (2) 13 Ves., 108. (3) 9 Moo. I. A., 123.

of the death of that son. The property was first given to the sons as a joint Hindu family absolutely, and the question whether the first estate could be only an estate for life did not arise. Before this judgment it had been held by this Board(1), that the extent of the power of testamentary disposition by Hindus must be regulated by the Hindu law, and subsequently, in the judgment in *Beer Pertab Sahee* v. *Rajender Pertab Sahee*(2), it is said (p. 37): "It is too late to contend that because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*."

The leading case on Hindu wills is the *Tagore case*(3). It is unnecessary to refer to the particulars of the will in that case. Two rules applicable to the will now under consideration are laid down in the judgment of the Committee: one is "that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and, therefore, must either in fact or in contemplation of law be in existence at the death of the testator" (p. 70). The other is that the first taker under the will may take for his life time (pp. 66, 80). And it is said (p. 69: "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred." These appear to their Lordships to be the limits of the analogy between wills and gifts *inter vivos* which have been recognized. They are not aware of any authority in support of Mr. Mayne's contention, as they understood it, that in the present case there would not be such a transfer of possession to the person who would take by virtue of the power as is necessary to enable it to be validly exercised. It appears to them to follow, from the first taker being allowed to have only a life-interest, that his possession is sufficient to complete the executory bequest which follows the gift for life. The result of the decisions is that, according to settled law, if the testator here had himself designated the person who was to take the property in the event of Mamu dying childless, the bequest would be good.

(1) 8 Moo. I. A., 85. (2) 12 Moo. I. A., 1.
(3) 9 B. L. R., 377, and L. R. I. A., Sup. Vol., 47.

1897.

Bai Motivahu v. Bai Mamubai.

The remaining question is whether his substituting Mamu, and giving her power to designate the person by her will is contrary to any principle of Hindu law. There is an analogy to it in the law of adoption. A man may by will authorize his widow to adopt a son to him, to do what he had power to do himself, and although there is here a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu law. Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu law are applicable to this power, and that it is their duty to hold it to be valid. But whilst saying this they think they ought also to say that, in their opinion, the English law of powers is not fit to be applied generally to Hindu wills.

Their Lordships will humbly advise Her Majesty to affirm the decree of the appellate Court with a merely verbal variation for the purpose of more clearly expressing the evident intention of the High Court. That variation is as follows. Instead of the declaration contained in the decree relating to paragraph 8 of the will and of the declaration relating to the testamentary power given to the plaintiff Mamubai by paragraph 18 of the will, insert a declaration that the gifts contained in these paragraphs respectively to such persons as Mamubai may direct by making her will are valid gifts so far as the same may be directed to be delivered to persons who were in existence, either actually or in contemplation of law at the death of the testator Jetha Ladhani and not further or otherwise, but that this Court cannot and doth not determine upon whom the property subject to such powers respectively will devolve if and so far as such powers are not validly exercised. The Courts below have ordered that the costs of all parties as between solicitor and client should be paid out of the estate of the testator, and their Lordships make a like order as to the costs of this appeal.

Decree affirmed.

1897.

Bai Motivahu
v.
Bai Mamubai.

NOTE.

In this case, the Privy Council upheld a power given by a testator to another to appoint by will the person, who was to take the property of the testator, and declared that gifts made under such a power of appointment will be valid in so far as they may be made to persons in existence at the death of the testator. The Privy Council relied for the recognition of such a power on the analogy of the power to adopt that may be given by a husband to his wife; for an examination of the validity of this analogy, see Mukhopadhyay on Perpetuities, (Tagore Law Lectures 1898), pp. 193-198. For instances of application of the rule laid down by the Privy Council, reference may be made to *Kashinath* v. *Chimnaji*, I. L. R., 30 Bom. 477; *Raghavji* v. *Narandas*, 8 Bom. L. R. 921 and *Yethirajulu* v. *Mukunthu*, I. L. R. 28 Mad. 363. Reference may also be made to *Upendralal* v. *Hemchandra*, I. L. R., 25 Calc. 405, and *Rojomoyee* v. *Troylucko*, I. L. R., 29 Calc. 260, in which the Calcutta High Court pronounced against the efficacy of a power which authorized the widow of a testator to establish an idol and to dedicate properties for its maintenance.

RAMLAL MOOKERJEE

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

[*Reported in I. L. R., 7 Calc., 304.*]

THEIR LORDSHIPS' JUDGMENT WAS DELIVERED BY :

1881.
March, 1.

Sir R. P. Collier.—This was an administration suit for the purpose of carrying into effect the trusts of the will of one Beharilal Mookerjee, instituted by the Secretary of State for India, in which Komoleh Kamini Debi, widow of the testator, Moni Lal Bundopadhya, father and guardian of a minor, Hori Dasi Debi, daughter's daughter of the testator, and Ramlal Mookerjee, a brother of the testator, were made defendants. Two other defendants were afterwards added, described in the will as advisers of the widow. The plaint concludes in these terms :—

"But as the defendant No. 3, Ramlal Mookerjee, has impeached the will as a forgery, and as defendant No. 1, the widow, who has the management of, and is in the enjoyment of the profits of, the estate under the provisions of the aforesaid will, has omitted to take any action to have the validity of the will determined, or to carry out the charitable bequests therein contained, though the period for carrying out such bequests has expired, and as the rights and interest of this plaintiff, as well as of other persons interested in the above will, are thereby seriously endangered, it is therefore prayed, that the authenticity and validity of the said will may be declared, and that the said Komoleh Kamini Debi, defendant No. 1, be directed and enjoined to make over to the Collector, or such other trustee or trustees as the Court may appoint, the sum of one lac and fifty thousand (Rs. 1,50,000), in Government securities, for the establishment of the aforesaid school and hospital, and a further sum of rupees one thousand (Rs. 1,000) (*sic*) for the furnishing of the said school and dispensary ; and further, that the rights of the several parties under the will may be ascertained and determined, and that a scheme for the due administration of the trust under the will may be propounded with such other relief as the Court may think fit to grant."

Beharilal Mookerjee, a wealthy Hindu, made the will in question on the 9th of August 1870. He had then a wife living. He had never had a son, but had had a daughter, who had died, leaving an

* *Present* :—SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER and SIR R. COUCH.

1881.

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infant daughter, Hori Dasi Debi. As he was then not passed middle age, he may have reasonably contemplated having further issue. He died on the 12th of August 1874, without sons or daughters, leaving his wife and grand daughter him surviving, and a brother, Ramlal Mookerjee, the defendant, with whom he had not been on good terms. The material parts of the will for the purposes of the present appeal are as follows :—

"2. I have no son at present. If one or more sons should be born to me hereafter, and should have arrived at majority at the time of my death, then he or they shall be entitled to my properties according to the *shastras*.

"3. If my son or sons, or any son (of mine), should be a minor at the time of my death, then the whole of my properties shall remain under the Court of Wards until my son, or, in the case of my having more sons than one, until the youngest son, has attained majority.

"4. If grandsons or great-grandsons of mine should be living at the time of my death, they shall be the owners of my property according to the *shastras*.

"5. If no sons, grandsons, or great-grandsons of mine should be living at the time of my death, then my wife, Srimoti Komoleh Kamini Debi, shall be proprietress of the whole of my properties, according to the *shastras*, and shall enjoy the profits thereof during her life time.

"6. If one or more daughters should be born to me, then, on the death of my wife, she or they, and, on the death of her or of them, my grandsons (daughter's sons), shall be the owners of my property according to the *shastras*.

"7. If no daughter or daughter's son of mine, should be living at the time of the death of my wife, then my grand daughter (daughter's daughter), Srimoti Hori Dasi Debi, shall become the proprietress of my property, and shall remain in undisputed possession thereof from generation to generation.

"8. If the death of my wife should take place before my grand daughter (daurhter's daughter) arrives at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards, until she arrives at majority and bears a son.

"9. If my grand daughter (daughter's daughter) should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for life."

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Here follow bequests for the purposes of establishing a school and dispensary, with respect to which no question now arises. Clause 20 is in these terms:—

"If no son or daughter should be born to me, or if my granddaughter (daughter's daughter) should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government. The whole of the profits of my estate, which shall remain as surplus after the expenses connected with the various matters specified above have been defrayed, shall be employed by the Government, as it thinks proper, in the improvement of the school and dispensary, and in alleviating the sufferings of the blind, the lame, the poor, and the helpless of my native village, and of the neighbouring villages."

After some previous proceedings, which it is not now necessary to refer to, the present suit was instituted on the 19th May 1876. All the defendants, except Ramlal, supported the will, and the widow submitted that she had carried out its directions to the best of her ability.

Ramlal disputed the *factum* of the will. He also maintained that no part of it was effectual except that which gave the estate to the widow for life.

On the cause coming on for hearing before Mr. Prinsep, the Judge of Hughli, he was of opinion that the making of the will was fully proved; that, under its provisions, and subject to the payment of an immediate legacy of Rs. 1,50,000 for charitable purposes, the widow took a life-interest in the estate; that, on her death, Hori Dasi, if not disqualified, would succeed and take a life-interest; but that, after the death of both ladies, or on the death of the widow, if Hori Dasi should be then disqualified, the estate would pass to the next legal heir of Beharilal Mookerjee, a supposed devise to the male descendants of Hori Dasi being, in the Judge's view, opposed to the rule laid down in the *Tagore Case*(1), and ineffectual, and the devise to Government coming after it being thus defeated. He also directed, that the fund created by the legacy should be vested in the Collector as trustee, but declined to propound any scheme for the management, and he ordered that the costs of all the parties should come out of the estate.

Against this decision Hori Dasi appealed, on the ground that her interest had been unduly curtailed.

(1) 9 B. L. R., 377.

1881.

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Ramlal, on the ground that Hori Dasi took nothing under the will; he no longer disputed its *factum*.

The Secretary of State, on the ground that the gift over to the Government, in certain events, ought to have been held good.

The High Court held, that Beharilal's intention was to confer on Hori Dasi, if she survived, and was, on the widow's death, not disqualified, an absolute estate, and that his intention was effectuated; also that the gift over to the Government, which they interpreted as taking effect in the event of Hori Dasi not surviving the widow, or being disqualified at the time of the widow's death, but not in the event of her becoming subsequently disqualified, was good.

The High Court, indeed, observed:—"The only case not clearly provided for in the will seems to be this: If Hori Dasi had a son who survived her, but herself died before the widow:—Was it intended that the Government should take, or was the son to take? On the one hand, neither of the further events contemplated in the 20th clause would have arisen,—*i.e.*, Hori Dasi would not have died without giving birth to a son, nor would she be disqualified at the death of the widow, unless we say that death itself is included in disqualification; nor, on the other hand, could Hori Dasi's son easily succeed, being a stranger, and not provided for in the will. But we need not occupy ourselves with a case not before us."

A decree was drawn up, which, in some points which will be subsequently referred to, is not in conformity with the judgment.

No argument has been addressed to their Lordships founded on the first six clauses of the will, which are no more than bequests in accordance with what the testator conceived to be the rules of the ordinary Hindu Law of succession. All of these, except the 5th, refer to possible events which did not happen. The 5th describes an ordinary Hindu widow's estate, which would take effect on the death of the testator by operation of law. The argument in favour of the appellant has been founded on the 7th, 8th, 9th and 20th clauses.

It was not, and could not be, disputed, that, since the case of *Soorjeemoney Dossey* v. *Denobundoo Mullick*(1), recognized and confirmed as that case has been in the case commonly called the *Tagore Case—Jatindramohan Tagore* v. *Ganendramohan Tagore*(2), and in *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*(3), a gift by

(1) 9 Moo. I. A., 123.
(2) L. R. 2 I. A., Sup. Vol. 47; S. C., 9 B. L. R., 377.
(3) L. R. 5 I. A. 138; S. C., I. L., 4 Calc., 23.

1881.

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will upon an event which is to happen, if at all, immediately on the close of a life in being, to a person in existence, and capable of taking under the will at the testator's death, was good and valid under Hindu law; and consequently that it was competent to the testator, by the use of apt words, to confer an absolute estate on Hori Dasi on the death of his widow. But it was argued that the words "*putro poutradi krame*" (translated in the record "from generation to generation,") expressed in their etymological sense an intention on the part of the testator to limit the succession to the heirs male of Hori Dasi; that the gift, being "*stridhan*," would descend by law, in the first instance, to her unmarried daughters equally with her sons, and that in its further descent females would have peculiar rights; that, therefore, the testator had endeavoured to create an estate of inheritance in her inconsistent with the general law of inheritance, which endeavour, under the authority of the *Tagore Case* (1), would render his gift to Hori Dasi void, or at the least, would prevent its operating further than to give her an estate for life. This latter view was adopted by the Judge of first instance. Upon this question the High Court observed:—

"We dissent entirely from the learned Judge, when he holds that the words *putro poutradi krame* denote an attempt to limit the succession to Hori Dasi's male descendants in any manner opposed to the decision in the *Tagore will Case*, *Tagore* v. *Tagore*(1); the devise and bequest to her are contained in the words '*adhikarini haibek*,' and the words added are merely usual words implying an absolute and heritable estate.

"If these words are to be interpreted in the sense applied to them by the Judge, very few grants in the Bengali language could stand, because the formula is one constantly used to show that the estate is to go beyond the life."

The effect of these words is thus spoken of by Sir Barnes Peacock in delivering the judgment of the High Court in the *Tagore case—Jatindramohan Tagore* v. *Ganendramohan Tagore*(2).

"A gift to a man and his sons and grandsons, or to a man and his sons' sons, would, in the absence of anything showing contrary intention, pass a general estate of inheritance according to Hindu law. I believe the words usually used in Bengal are '*putro poutradi krame*', and in the Upper Province '*naslan baad naslan*' the literal

(1) 9 B. L. R., 377.
(2) 4 B. L. R., 182.

1881.

Ramlal Mookerjee v. Secretary of State

meaning of the former being to sons, grandsons, &c., in due succession, and of the latter in regular descent or succession."

The correctness of these observations was not questioned in the judgment on appeal. It was not denied at the bar that these words, though undoubtedly importing the male sex in their primary signification, would, in the case of a gift to a male, be read as words of general inheritance, and would include female as well as male heirs, where, by the law, his estate would descend to females. Their Lordships feel no greater difficulty in applying them to the female heirs of a female, where, by law, the estate would descend to such heirs, and see no sufficient reason for narrowing the construction of words which have been often recognized in India and by this Board as apt for conferring an estate of inheritance. They are of opinion that clause 7, if it stood alone, would confer an absolute estate on Hori Dasi upon the death of the widow.

Clause 8 has been relied upon for enforcing the argument that the testator's object was to benefit the sons of his grand-daughter, an object which their Lordships think he might reasonably suppose best effectuated by giving complete power over the estate to his grand-daughter. The provision for management by the Court of Wards obviously does not affect Hori Dasi's estate.

But it has been further contended that the conditions under which, by clause 9, Hori Dasi is to take, or, more properly speaking, under which she is not to take, are so uncertain as to render the gift to her void. It has been argued, that no time is fixed at which the disqualifications are to operate, that she may become a sonless widow at any period of her life, and that, therefore, it must always remain uncertain whether or not she is capable of taking the gift. In their Lordships' opinion, all difficultly as to the question of time is got rid of, by reading the clause in conjunction with that which precedes it, and treating the death of the widow as the time when it is, if at all, to take effect. This natural interpretation of the clause gives effect to it, and their Lordships are by no means disposed to give it a forced construction which would defeat its operation. The death of the widow is, in their opinion, the point of time when it is to be ascertained once for all whether Hori Dasi takes, or is disqualified from taking.

More difficulty arises in the construction of clause 20.

It has been argued that the words "if my grand daughter should die before she bears a son" are not limited to any point of time; that if this be so, the other disqualifications mentioned in that

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clause (which are repetitions of those in clause 9) are not limited either, and may take effect at any period of Hori Dasi's life; that they are in effect conditions subsequent, upon the happening of any of which, the estate, if it had ever vested in her, would be divested. It has been further argued, that the gift over of an estate on events which may happen, not upon the close of a life in being, but at some uncertain time during its continuance, is void, as contrary to Hindu law.

If, as the High Court have found, their Lordships think rightly, that one main object of the testator was to prevent his brother taking his property in any event, it is obvious that clause 9, creating the incapacity, under certain circumstances, of the grand-daughter to take upon the widow's death, required to be supplemented by another directing on whom the estate, if such incapacity happened, should devolve. This is the purpose of clause 20, which should be read as supplementary to clause 9, and as if it had immediately followed it. This purpose points to the construction that the gift over was to take effect, if at all, at the widow's death. When providing for the devolution of the estate on Hori Dasi's being disqualified to take it, it was natural that the testator should also provide (which he had not done before) for its devolution in the event of her dying before her grand mother. This provision is, by implication, contained in clause 20, and full effect may be given to every part of the clause, without supposing (what their Lordships agree with the High Court is somewhat improbable) that the testator intended the estate, if once vested in his grand daughter, should be liable to be afterwards divested.

Viewed in this light, the section would read,—

"If no son or daughter be born to me, or if, on my widow's death, my grand daughter should have died before bearing a son, or should be barren, or become a sonless widow, or otherwise disqualified, then the whole of my properties shall pass into the hands of the Government."

This construction, which their Lordships adopt, makes it unnecessary to discuss whether the disqualifications, if they had been conditions subsequent, would or would not be in violation of Hindu law. It has not been disputed that, if they are to be ascertained on the widow's death, the gift over to the Government is good.

One possible event, undoubtedly, is unprovided for, *viz.*, the grand daughter predeceasing the widow, having borne a son.

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Their Lordships do not deem it necessary to decide what would happen on the occurrence of this event. Indeed, no judgment which they could give would affect the rights, if he should have any, of a son yet unborn, in the case supposed. In declining to declare the rights of the parties in this contingent event, they are acting in conformity with the rule laid down in the case of *Lady Langdale* v. *Briggs*(1) explained as it was in the *Tagore Case*.(2)

It follows that the decree of the High Court must be amended by substituting, for the words "not surviving," "having died during the life time of such widow without bearing a son."

It is further necessary that, for the words "or without a living son," there should be substituted the words "or a sonless widow." The decree as it stands is neither in accordance with the will nor the judgment.

Subject to these variations, their Lordships will humbly advise Her Majesty that the decree be affirmed. The costs of all the parties to the appeal should be paid out of the testator's estate.

(1) 8 DeG. M. & G., 391. (2) 9 B. L. R., 377.

NOTE.

This decision of the Judicial Committee is an authority for the proposition that the words *putra poutradi krame* (from generation to generation), though importing the male sex in their primary signification, apply also to the female heirs of a female, where by law the estate would descend to such heirs, and are apt for conferring an estate of inheritance upon either male or female. For other decisions of the Privy Council upon the same point, reference may be made to *Bhoobun* v. *Hurrish*, L. R. 5, I. A. 138 ; *Harihar* v. *Uman*, L. R. 14 I. A. 7 ; *Lalit* v. *Chukkun*, L. R. 24 I. A. 76.

The decision of the Judicial Committee leaves open two important points :

(i) Whether the Hindu law allows an estate to be given subject to conditions subsequent, upon the happening of any of which an estate, which has once vested, would be divested.

(ii) Whether the gift over of an estate on events which may happen, not upon the close of a life in being, but at some uncertain time during its continuance, would not be void under the Hindu law.